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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

FRED E. LANGENEGGER, *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

This is a suit for just compensation under the Fifth Amendment of the Constitution for a taking by the United States of United States citizens' property in El Salvador. The suit, which was dismissed on motion for summary judgment, presents important issues regarding the protection which the Constitution affords to citizens who own real property and other investments abroad. The questions presented are:

1. Whether the United States is required by the Fifth Amendment to pay just compensation to its citizens when, to accomplish important United States foreign policy objectives, the United States participates directly and substantially in a foreign government taking of such citizens' property by: (i) applying unusual, direct, specific and irresistible pressures which compel the foreign government to carry out the taking, *and* (ii) participating substantially and crucially in the planning and legal drafting of the taking and directly financing the activities of the foreign officials and organizations in carrying out the taking?

2. Whether United States citizens' opportunity to present evidence of the nature, degree, and effect of United States involvement in a foreign taking should be denied by rulings:

a. that United States diplomatic and economic pressures, however strong and irresistible they might be as a factual matter, are insufficient as a matter of law to warrant a finding of "direct and substantial" United States involvement in a foreign government taking, and

b. that the benefit to the United States from the achievement of important foreign policy objectives must as a matter of law be considered to be a benefit only incidental to a taking of property, even if such desired benefit was the essential motive and cause for the taking?

PARTIES TO THE PROCEEDINGS

Petitioners are Fred E. Langenegger, Steven W. Langenegger, James Langenegger, as administrator of the estate of Zula Langenegger, Ida Anna Nolder, Floreine Edith Stangle, and Emma Frieda Zuercher.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners Fred E. Langenegger, Steven W. Langenegger, James Langenegger as administrator, Ida Anna Nolder, Floreine Edith Stangle, and Emma Frieda Zuercher respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (set forth at pages 1a-17a of the Appendix to this Petition) is reported at 756 F.2d 1565. The opinion of the

United States Claims Court (set forth at pages 18a-32a of the Appendix) is reported at 5 Cl. Ct. 229.

JURISDICTION

The judgment of the court of appeals (App. at 33a) was entered on March 12, 1985. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

This case involves the Just Compensation Clause of the Fifth Amendment of the United States Constitution (U.S. Const. Amend. V), which states:

> "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The petitioners, all native-born citizens and life-long residents of the United States, were the owners of a large coffee farm in El Salvador that was taken, without compensation, in March 1980 to accomplish what were perceived at the time to be important United States foreign policy objectives.

In early 1980 the expropriation of large farms in El Salvador, including petitioners', and their redistribution to agrarian workers, had become the single most important tactical objective of United States policy in El Salvador and Central America. Such expropriation had taken on symbolic importance that overrode concerns of practicality and legality, and was considered by the United States Executive Branch to be crucial to its efforts to cast the Salvadoran junta as a credible reformist government that could attract European and Latin American support for

United States policies in Central America and undercut the appeal of leftist opponents.

The taking of petitioners' farm was carried out physically by Salvadoran personnel under a decree issued by the Salvadoran junta, but in all other aspects the taking was the act of the United States Government. The United States was the instigator of the taking, which occurred only because of direct, specific and irresistible pressures applied by the United States against the Salvadoran junta and military establishment. These pressures included (i) specific, credible threats to deny all economic, military, and diplomatic assistance and to engage in economic and political sanctions and reprisals if the junta did not promptly carry out the taking, and (ii) specific promises and commitments to provide substantial economic, military and diplomatic assistance to El Salvador if the taking was carried out.

In addition, the United States controlled and participated directly in the planning of the taking and in the drafting of the expropriation decree. It also financed the taking program. Through May 1981 alone the United States committed over $60 million specifically earmarked for financing the promotion, planning and execution of the expropriation program. Funds were provided specifically to pay for the salaries, transportation and operating costs of the teams that physically seized the properties, to provide operating funds and working capital for the new operators of the farms that were seized, and to finance Salvadoran government organizations involved in various aspects of the expropriation program. However, the United States expressly prohibited the use of any United States aid to pay compensation to the owners whose farms were taken, and the Salvadoran government did not offer any meaningful compensation.

On February 26, 1981, petitioners filed a complaint/petition (App. at 34a-49a) in the United States Court of Claims[1] alleging United States factual responsibility for the taking and constitutional responsibility to pay just compensation. Petitioners based their claim under the Just Compensation Clause of the Fifth Amendment on alternative theories. Count I alleged, in essence, that the pressures and actions of the United States were the overwhelmingly dominant cause of the taking and that the Salvadoran officials who carried out the taking did so as agents of the United States (App. at 43a-44a). Count II alleged, alternatively, that the involvement of the United States in the taking was sufficiently direct and substantial to make the taking a joint operation of the two governments, for which the United States was liable (App. at 44a-45a).

The United States denied certain factual allegations and a protracted discovery period ensued. When the United States objected to discovery on the grounds that much of the information sought was classified, petitioners' counsel agreed to obtain, and did obtain, a government security clearance and, after considerable delay, received access to numerous classified documents which recorded in detail the United States role and involvement in the taking. Depositions also were taken of the key State Department officials, including former United States ambassadors to El Salvador, who were responsible for carrying out the United States policies. Petitioners' detailed summary of the United States role and involvement in the taking, based on the information obtained in discovery, is contained in Petitioners Statement of Genuine Issues which is filed

[1]The Court of Claims, which had jurisdiction at the time under 28 U.S.C. § 1491, was succeeded in 1982 by the United States Claims Court.

under seal in the Claims Court.[2] At the time summary judgment was entered there also was outstanding a motion by petitioners to compel production of additional government documents, on which the Claims Court reserved judgment.

In the Spring of 1983, after substantial discovery had been completed and a trial date set, the United States moved for summary judgment, arguing that regardless of the nature, degree, or effect of the United States role and involvement in the taking, petitioners' claim should be dismissed as a matter of law. The United States Claims Court, in an opinion dated May 14, 1984 (App. at 18a-32a), granted summary judgment on the alternative grounds (i) that petitioners' claim presented nonjusticiable political questions (App. at 24a-30a), and (ii) that the United States could not be held responsible for a taking where it did not participate directly in the physical act of taking and did not receive a possessory or economic interest in the property that was taken (App. at 20a-24a).

The Court of Appeals for the Federal Circuit, in an opinion dated March 12, 1985 (App. at 1a-17a), affirmed the summary judgment, but on different grounds. It rejected the Claims Court view that the case presented nonjusticiable political questions, holding that "[c]onsideration of land taking claims are clearly the role of the judiciary according to the Constitution, Amendment V . . . and the Constitution does not provide for a foreign affairs exception" (App. at 6a). The court of appeals also observed:

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[2]The United States declined to "declassify" the information obtained from the documents and depositions, but did not assert any "executive" or "state secret" privilege to prevent its discovery by petitioners.

> We note that this case does not require a judicial determination of El Salvador's sovereignty or the appropriateness of its actions, as appellee contends it does; nor does the case question the executive's authority to undertake any action. Appellants explicitly accept that El Salvador is a sovereign government recognized by the United States, that the expropriation was valid, and that by their claims appellants do not seek to question executive authority. Appellants present only a narrow issue: whether the United States' involvement was sufficiently direct and substantial to warrant a holding that apart from the taking by El Salvador, there was a taking by the United States obligating it to pay "just compensation." (App. at 6a-7a).[3]

With regard to the Just Compensation Clause issues, the court of appeals expressly cited a series of established constitutional principles that support petitioners' claim: (1) that "[i]t is settled law that the United States is bound by our Constitution when it takes actions that affect citizens outside our territory" (App. at 9a-10a, citing *Reid v. Covert,* 354 U.S. 1, 5 (1957)); (ii) that "[i]t also is an accepted principle that it is not essential for the government to have taken property for its own use for a taking to be found" and that " '[t]here can be a taking if the Government makes it possible for someone else to obtain the use or benefit of another person's property' " (App. at 10a, citing *Hawaii Housing Authority v. Midkiff,* 52 USLW 4673 (U.S. May 30, 1984), and *Aris Gloves, Inc. v. United States,* 420 F.2d 1386, 1391 (Ct. Cl. 1970)), and (iii) that

[3]The court also concluded that adjudication of petitioners' claims regarding the United States role and involvement in the taking would not require disclosure of sensitive and confidential communications, and noted that the government had not asserted any "state secrets" privilege (App. at 7a).

"[t]he United States may be held responsible for a taking even when its action is not the final direct cause of the property loss or damage" (App. at 10a, citing *National Board of YMCA v. United States,* 395 U.S. 85, 93 (1969)).

The court of appeals concluded, based upon *National Board of YMCA v. United States,* and upon its own distillation of prior Court of Claims decisions, that where the United States is charged with responsibility for a taking that is physically accomplished by another government or party, "a determination must be made whether the [United States] government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment." (App. at 10a, quoting *National Board of YMCA v. United States,* 395 U.S. at 93.) Notwithstanding this conclusion, the Court of Appeals denied petitioners the opportunity to develop and present facts at trial to prove the very direct, substantial and overwhelming United States involvement in, and factual responsibility for, the taking of petitioners' property. The court did so by abruptly announcing two artificial rules of law, for which there is no precedent.

First, the court announced that "diplomatic persuasion among allies" (*i.e.,* direct economic and political pressures, threats and inducements), "as a matter of law, cannot be deemed sufficiently irresistible to warrant a finding of direct and substantial involvement, however difficult refusal may be as a practical matter" (App. at 13a-14a).

Second, the court announced that the benefits derived by the United States from furtherance of important foreign policy objectives (which the court characterized as "hemispheric stability") must, as a matter of law, "be characterized as a benefit only incidental to the expropriation" – regardless of whether, in fact, such desired benefit

was the dominant cause and motivating force for the taking. (App. at 14a).

Petitioners ask that a writ of certiorari issue to review these artificial and unprecedented rulings of the court of appeals, which conflict directly with well-established constitutional principles and which, if allowed to stand, will severely limit the protection of citizens' property guaranteed by the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

This case merits Supreme Court review for two basic reasons: (i) it presents a very important constitutional issue that has not been addressed previously by the Court, and (ii) the court of appeals decision conflicts irreconcilably with fundamenal constitutional principles that have been recognized in prior decisions of the Supreme Court and other federal courts.

Supreme Court review of this case is particularly important because the Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction over Fifth Amendment taking claims that exceed $10,000.[4] As a result, it is unlikely that any direct conflict will arise among the federal circuits regarding the interpretation of the Fifth Amendment, and unless the requested writ is granted the court of appeals decision in this case will effectively become "the law of the land" and the protections afforded by the Fifth Amendment to United States citizens' property and invest-

[4]The United States Claims Court has exclusive jurisdiction over Fifth Amendment takings claims which exceed $10,000 (28 U.S.C. § 1491(a)(1)), and decisions of the Claims Court are appealable only to the Court of Appeals for the Federal Circuit (28 U.S.C. § 1295(a)(3)). The Claims Court and the federal district courts have concurrent jurisdiction over claims not exceeding $10,000 (28 U.S.C. § 1346(a)(2)).

ments abroad will be severely restricted, to the point of being illusory. Supreme Court review is needed to insure that the Court of Appeals for the Federal Circuit interprets and enforces Fifth Amendment property rights consistently with basic constitutional principles and other provisions of the Bill of Rights.

1. This Case Presents Important Constitutional Issues that Have Not Been Addressed Previously by the Supreme Court

The basic issue presented is whether United States citizens are protected by the Fifth Amendment guarantee of "just compensation" when the United States acts through and with a foreign government to take their property, in order to advance United States foreign policy objectives.

As was noted by the court below, this issue is novel, because it has not previously been addressed directly by any federal court. The issue also is narrow, but only in the sense that it does not involve any challenge to the Executive's authority, or any second-guessing of the Executive's policies. In all other aspects the issue of the protection afforded by the Just Compensation Clause to citizens' property in foreign countries is broad in its significance and implications. It is extremely important to all United States citizens and business entities that own property or have investments or business operations abroad, and it involves very significant constitutional principles.

The importance of the issue stems in part from the likelihood of the reoccurrence of similar events as the Executive Branch feels called upon to play an active role in the affairs of smaller nations in response to perceived threats to United States interests posed by alien philoso-

phies and local political unrest. In the instant case, petitioners' farm and agricultural business in El Salvador were sacrificed to United States foreign policy interests in "hemispheric stability". In another country or another context our nation's leaders may determine that crucial United States interests in "stability" necessitate redistribution of other segments of a foreign economy (*e.g.*, mining, manufacturing, or banking) in which there is private United States ownership or investment, and the United States may again use it resources and powers to further such United States interests at the expense of the individual property rights of its citizens. The likelihood of reoccurrence is underscored by the fact that a similar situation has arisen recently in Honduras, where it is alleged that the United States caused the Honduran government to take land of a United States citizen for use as a regional military training center in support of United States policies in El Salvador and Nicaragua. See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated and remanded for reconsideration*, 53 U.S.L.W. 3824 (U.S. May 20, 1985) (No. 84-1398), where the en banc court of appeals held that plaintiffs' suit for injunctive and declaratory relief raised justiciable questions.[5] Because the plaintiffs in *Ramirez* sought injunctive relief rather than just compensation under the Fifth Amendment, the Fifth Amendment issues presented in the instant case have not yet been addressed directly in the *Ramirez* case, although several judges were of the view that the availability of a claim in the United States Claims

[5]The Supreme Court remanded for reconsideration in the light of certain recent events, including federal legislation relating to the regional military training center, which are not relevant to the instant case.

Court for compensation under the Fifth Amendment made injunctive relief inappropriate.[6]

Wholly apart from the likely occurrence of similar events, the present case merits Supreme Court review because of the importance of the constitutional issue that is presented, and its bearing on the value and significance of United States citizenship. The court below faced what it considered to be a novel factual situation and observed that "interpretations of the Just Compensation Clause indeed are nebulous, especially where a foreign government's involvement exists" (App. at 9a). Although the court recognized the existence of basic constitutional principles which could serve as "useful guides" (App. at 9a), its decision in fact ignores those "guides" and reflects a basic predisposition that:

> It is our view also that one who owns land in a foreign country looks to the laws of that country to determine his incidents of ownership including his rights in the event of expropriation. He may look also to international law if a foreigner in the expropriating country, but that is a secondary backup that does not vary the source of his primary rights. (App. at 15a).

In the context of this case, such a view denigrates the value of American citizenship. Neither foreign nor international law governs a United States citizen's rights vis-a-vis his own government. Such rights are governed by one's rights as a citizen — in this instance, citizens of the United States, entitled to the protections of the Constitution and laws of the United States. This concept "is as old as

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[6]See the dissenting opinion of Scalia, J., 745 F.2d at 1550, 1551-1556. The plaintiffs in *Ramirez* brought suit for injunctive and declaratory relief in the federal district court, alleging that the actions of United States officials were unauthorized and unlawful.

government," having been recognized long before the apostle Paul, while in Jerusalem, successfully asserted his rights as a Roman citizen vis-a-vis actions of the Roman government. *Reid v. Covert*, 354 U.S. 1, 6 (1957).

The decision in *Reid v. Covert* adopts this concept and makes it clear that the United States is bound by the Constitution when it takes actions that affect United States citizens in foreign countries. It is well-established that the United States is required by the Fifth Amendment to pay just compensation when it directly takes a citizen's property abroad. *E.g., Seery v. United States*, 127 F.Supp. 601 (Ct. Cl. 1955). However, the circumstances are rare in which the United States can directly take property abroad. Except where the United States is engaged in military operations in a foreign country, or acting as an occupying government, the United States normally has no jurisdiction or power to act directly against property in a foreign country. *See, e.g., Turney v. United States,* 115 F.Supp. 457, 459-460 (Ct.Cl. 1953). In the more usual situation, where the United States can act only through or with a foreign government, the Supreme Court has had no prior occasion to provide guidance regarding the application of the Just Compensation guarantee of the Fifth Amendment. In the absence of specific guidance, the court of appeals in this case made rulings that conflict with fundamental constitutional principles and artificially immunize the United States from responsibility for anything other than direct takings.

First, the court's ruling that the benefits of achievement of foreign policy objectives must be viewed as only incidental to any taking of property – *i.e.*, that such benefits do not satisfy the "public use" provision of the Just Compensation Clause – effectively limits United States liability to cases in which it takes physical posses-

sion of property located abroad. As a result of such ruling, a United States citizen's property located abroad is accorded far less protection against United States actions than property located within the boundaries of the United States.

Second, the court's ruling that "diplomatic persuasion" is insufficient as a matter of law to support a finding of United States liability for a foreign taking effectively immunizes the United States from responsibility for any indirect taking of property located abroad. This is not a case in which the United States merely condoned, approved, or encouraged a foreign government taking, or failed to take action to protect the rights or interests of United States citizens. Petitioners have alleged, and are prepared to prove by contemporaneous government documents and testimony of United States officials, that the United States used practically every conceivable threat and inducement to cause the taking; that the United States actions did in fact cause the taking; and that the United States was directly and substantially involved in all aspects of the taking. The term "diplomatic persuasion", as used by the court of appeals, must therefore be read as encompassing all conceivable pressures that the United States can apply against a smaller, dependent government, except perhaps the actual use of physical or military force to compel such other government to do its bidding.

The court of appeals decision elevates form over substance and reality and eliminates any meaningful Fifth Amendment protection of the foreign property and investments of United States citizens. It gives the Executive Branch free rein to trample property rights of citizens so long as it acts through another government, rather than directly.

Finally, the decision in this case has a serious impact, affecting billions of dollars of American investments abroad, even in situations where the United States is not involved in, and even opposes, foreign government expropriations or seizures of property. The court of appeals decision destroys the moral and legal bases of America's traditional position on international law and exposes all American investments abroad to increased jeopardy from actions of foreign nations. The United States has long maintained that under international law a foreign government that takes property of a national of another country is required to pay prompt and just compensation, regardless of whether such government compensates its own nationals. Other nations, particularly within the Soviet Bloc and in less developed areas of the world, do not share this view. "Our government has, however, been among the strongest proponents of the view that the right to full and fair compensation exists and must be respected by other nations." *Shanghai Power Company v. United States*, 4 Ct. Cl. 237, 241 n. 3 (1983), *aff'd.*, No. 84-860, unpublished opinion (Fed. Cir. Feb. 13, 1985). *See generally, id.* at 241, 245 n. 15. If the United States Government can act through and with a foreign government to take the property of American citizens, and not provide just compensation, it can no longer credibly maintain that "the right to full and fair compensation exists and must be respected by other nations."

2. There is a Fundamental Conflict In Principle and Approach Between The Court of Appeals Decision and Prior Decisions of the Surpreme Court and Other Federal Courts

The court of appeals decision conflicts irreconcilably with recognized constitutional principles regarding:

- the circumstances in which the United States is constitutionally responsible for actions of other parties or governments; and
- the nature of the benefit to the United States that satisfies the "public use" provision of the Fifth Amendment taking clause.

a. United States responsibility for actions of other parties or governments.

Prior Supreme Court and other federal court decisions make it clear that the question whether the United States is responsible under the Constitution for action taken by another party or government is essentially a factual question of the nature and degree of United States involvement in the action. If the facts show causal responsibility or other substantial United States participation, the United States is held to be constitutionally responsible. In contrast, the court of appeals decision in this case immunizes the United States from responsibility, regardless of what the facts may be.

The Supreme Court in *National Board of YMCA v. United States*, 395 U.S. 85 (1969), emphasizing that "[t]he Just Compensation Clause was 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*Id.* at 89), stated that where United States government action is causally related to acts of another party "a determination must be made whether the [United States] government involvement is sufficiently

direct and substantial to require compensation under the Fifth Amendment." (*Id.* at 93). The question of United States responsibility was treated as essentially a factual question, and the Court engaged in a careful analysis of both the purpose of the United States actions and the causal relationship between such actions and the deprivation of property.[7]

The same basic approach has been taken by the Court in other constitutional contexts. In *Byars v. United States*, 273 U.S. 28 (1927), the Court, noting that " 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon' " (*Id.* at 32), held the United States responsible under the Fourth Amendment for an unlawful search conducted by state officials where the United States involvement was sufficient to warrant a conclusion that "the search was in substance and effect a joint operation of the local and federal officers". (*Id.* at 33). The Court in *Byars* also made it clear that the decision in each case "rests, as the present case does, upon its own peculiar facts." (*Id.*)

The question of United States constitutional responsibility for actions of another government has arisen most frequently under the Fourth Amendment, in the context of claims against United States officials for monetary damages for unconstitutional searches (*e.g. Berlin Democratic Club v. Rumsfeld*, 410 F.Supp 144 (D.D.C. 1976)), and motions to exclude evidence (*e.g., Stonehill v. United*

[7]The *YMCA* case involved a Fifth Amendment claim for damage done to plaintiffs' property by rioters while United States forces were engaged in riot control activities in the Canal Zone in Panama – the basic allegation being that the temporary occupation of plaintiffs' buildings by United States forces caused greater damage to be inflicted by the rioters. The case could be resolved by summary judgment only because both parties moved for summary judgment based on a detailed stipulation of facts.

States, 405 F.2d 738 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969)) and it is well-established that the United States is responsible for a search conducted by a foreign or state government if the United States either causes or instigates the search, or participates with the other government to an extent that the search becomes a "joint venture" between the United States and the other government. *See, e.g., United States v. Hensel,* 699 F.2d 18, 25 (1st Cir.), *cert. denied,* 461 U.S. 958 (1983); *Stonehill v. United States,* 405 F.2d at 743-44; *Berlin Democratic Club v. Rumsfeld,* 410 F.Supp. at 154-155. *See also Corngold v. United States,* 367 F.2d 1, 5-6 (9th Cir. 1966). The finding of a "joint venture" in the Fourth Amendment cases does not depend upon United States instigation of the search, or upon the presence of United States officials at the scene of the search. A decision requires a careful examination of all of the facts and circumstances. "Whether the search does become a joint venture can be determined only by a comparison of what the Federal agent did in the search and seizure with the totality of acts done in the search and seizure." *Stonehill v. United States,* 405 F.2d at 744. Relevant factors include whether the United States encouraged or opposed the search, participated significantly in planning the search, and helped to identify evidence to be sought. *Id.* at 746. Furthermore, a finding of United States causation or instigation can be based on an agreement or understanding between the United States and foreign officials, rather than on specific pressures or inducements. *E.g., Berlin Democratic Club v. Rumsfeld,* 410 F.Supp. at 154.

Obviously, there are substantive differences in the Fourth and Fifth Amendment guarantees, but where the issue is United States responsibility for actions of another government, there is no valid reason why the principle or approach should differ in Fourth and Fifth Amendment cases. Under either Amendment, citizens should be pro-

tected against indirect or "stealthy" deprivations of their constitutional rights.

The court of appeals in the instant case declined even to address the relevant principles in Fourth Amendment cases. Moreover, while the court purported to apply the "direct and substantial involvement" test of *National Board of YMCA,* it in fact ignored that test and announced artificial rules that made the crucial facts regarding United States involvement irrelevant.

The court of appeals purported to base its decision on principles expressed in several prior decisions of the Court of Claims; in fact, it misread and misapplied those principles. The two principally relevant Court of Claims precedents are *Turney v. United States,* 115 F.Supp. 457 (Ct. Cl. 1953), and *Porter v. United States,* 496 F.2d 583 (Ct. Cl. 1975), *cert. denied,* 420 U.S. 1004 (1975). The court in *Turney* held the United States responsible for an embargo imposed by the Philippine government, which forced the plaintiffs to sell certain radar equipment to the United States Army. The lower court in the instant case expressly recognized that the decision in *Turney* "rested upon the finding that the Army's request for the embargo was substantial, direct involvement, forcing the corporation to exchange the radar." (App. at 12a) – *i.e.,* because of the particular relationship of the two governments, a *diplomatic request* by the United States constituted "substantial, direct involvement" by the United States in the embargo. This clearly is in direct conflict with the court of appeals ruling in the instant case that "diplomatic persuasion" can never constitute direct and substantial involvement in a taking, "however difficult refusal may be as a practical matter." (App. at 14a). The court of appeals' sole basis for distinguishing *Turney* was that there "[t]he benefit to the United States was clear; the Army reacquired the radar it mistakenly had sold." (App. at 12a).

The question of "benefit" is a separate issue, discussed *infra* at 21-22. Any distinction based on the nature of the benefit derived by the United States does not detract from the fact that the court in *Turney* found that a diplomatic request for specific action constituted direct and substantial involvement by the United States.

Porter v. United States is the only case cited by the court of appeals for its ruling that "diplomatic persuasion" cannot constitute substantial and direct involvement in a taking, but *Porter* does not support such a proposition. *Porter* reaffirmed the basic principle of the *Turney* case, stating that "[b]ecause the Manila government's action was prompted by 'irresistible pressure' from the United States, the court held an unconstitutional taking by defendant [the United States] had occurred." 496 F.2d at 592. It is not in fact clear that the decision in *Turney* required the United States pressure to be "irresistable". However, the important point is that *Porter,* like *Turney,* recognized that diplomatic pressure could be the basis for a finding of United States liability for a taking by a foreign government.

The court of appeals cited *Porter* as standing for the proposition that the acts of a separate sovereign government, "though controlled by the United States Department of Interior, cannot be imputed to the United States" (App. at 13a). This is a clear misreading. In *Porter* there were allegations that the government of the Pacific Islands Trust Territory, which was considered to be a separate sovereign entity and not an arm or agency of the United States, was subject to considerable influence from the United States Department of Interior, but there were no allegations that the Department of Interior had any involvement whatsoever in the particular actions that were alleged to be a taking. Indeed, it was not apparent that any United States officials even had knowledge of the par-

ticular actions that were alleged to be a taking. The decision in *Porter* is entirely consistent with the principle in *Turney* that where the United States uses specific influence or pressure to obtain a specific foreign government action, the United States can appropriately be held responsible for such action.[8]

Petitioners do not seek this writ merely to ask the Court to review the consistency of the court of appeals decision with prior Court of Claims decisions. Petitioners submit that the court of appeals decision and approach to the issues are in sharp conflict with all prior decisions regarding the circumstances in which the United States is constitutionally responsible for acts of a third party, including a foreign or state government – decisions of the Supreme Court in the context of both the Fifth and Fourth Amendments, decisions of other federal appellate and district courts in the context of the Fourth Amendment, and prior decisions of the Court of Claims in the context of the Fifth Amendment. All of these prior decisions have taken the

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[8]The court of appeals also cited several other Court of Claims decisions that have no real bearing on the issue presented here. *Anglo Chinese Shipping Co. v. United States*, 127 F.Supp. 553 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955), involved a claim by a foreign national, not a United States citizen, and the decision has no applicability outside the context of post-war administration of defeated enemy nations. At most it stands for the proposition that a defeated enemy nation, not the occupying victors, is responsible for paying for property requisitioned to carry out occupation functions. In *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978) the military officials were acting in an unauthorized manner, contrary to government policy, and in *De-Tom Enterprises, Inc. v. United States*, 552 F.2d 337 (Ct. Cl. 1977) the officials did not use or threaten any governmental powers or actions, but merely acted as an interested adjoining landowner in opposing a zoning change. In the instant case there is no question that the United States officials in the highest levels of the Executive Branch were acting within their authority and were using governmental powers to cause the taking.

position that United States responsibility for actions of another government or private party requires a careful factual examination to determine whether there was substantial and direct United States involvement in the complained of acts. All forms of United States involvement, including "diplomatic persuasion", are highly relevant to such determination. Indeed, persuasion and pressures can conclusively establish United States responsibility if a sufficient causal link to the action is found.

The decision of the court of appeals is a dangerous departure from this body of precedent.

b. The benefit to the United States that satisfies the "Public Use" provision of the Fifth Amendment Taking Clause.

The court of appeals ruling that the benefit derived by the United States from the accomplishment of foreign policy objectives "must be characterized as a benefit only incidental to the expropriation," and therefore cannot support a taking claim under the Fifth Amendment, conflicts directly with prior Supreme Court and other federal court decisions. The Supreme Court made it very clear in *Hawaii Housing Authority v. Midkiff*, 52 U.S.L.W. 4673 (U.S. May 30, 1984), that the forced transfer of private property from the owners to other private persons (in that case, tenants) in order to achieve broad social or economic policy objectives was a taking for "public use" for which "just compensation" was payable under the Fifth and Fourteenth Amendments.[9] There is no basis for conclud-

[9]The Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) similarly held that "[p]ermanent physical occupation authorized by government is a taking without regard to public interests that it may serve" (458 U.S. at 426) and, in rejecting a state's contention that occupation by a private party was not a taking, stated:

ing that a forced redistribution of land to accomplish a domestic social benefit is compensible, but that a similar forced redistribution to accomplish a foreign policy benefit is not. *See also Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970), where the court concluded that United States agreement and facilitation of the taking by the Soviet Union of a United States citizen's property in Germany, *in order to advance United States foreign policy interests*, satisfied all the normal requirements of a Fifth Amendment taking.[10]

"The Just Compensation Clause was 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' ". *National Board of YMCA v. United States,* 395 U.S. at 89. The cost of the conduct of foreign policy is a "public burden" that should not, in all fairness and justice, be borne alone by United States citizens who own property abroad. The lower court's contrary conclusion is a reflection of its predisposition that citizens who own property abroad must look to foreign law for protection. That predisposition, and the court's ruling, conflict irreconcilably with the established principle that citizens who reside or own property abroad are guaranteed the full protection of the Bill of Rights vis-a-vis the actions of their own government.

Petitioners respectfully submit that the court of appeals' significant departure from established constitutional principles merits Supreme Court review.

"A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." (458 U.S. at 432 n. 9).

[10]Recovery was denied in *Aris Gloves* based on the doctrine that a citizen's property located in enemy territory in a wartime situation is regarded as enemy property which is not protected by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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June, 1985

IN THE

United States Court of Appeals for the Federal Circuit

FRED E. LANGENEGGER, STEVEN W. LANGENEGGER, ET AL.	)	
Appellants,	)	
	)	Appeal No. 84-1402
v.	)	
THE UNITED STATES	)	
Appellee.	)	

DECIDED: March 12, 1985

Before RICH, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and NEWMAN, *Circuit Judge.*

NICHOLS, Senior Circuit Judge.

This case, an appeal from a grant of summary judgment and dismissal of a complaint, primarily presents a novel, narrow issue: whether the United States is responsible under the Just Compensation Clause of the Fifth Amendment for the expropriation of a United States citizen's property in a foreign land when the taking was mandated by a foreign sovereign's legislation passed at the prompting of the United States, and hemispheric stability is an ultimate benefit hoped for by the United States, but

the immediate benefit inures to natives of the expropriating nation. Appellants alleged such a taking in Counts I and II of their complaint below; alternatively they alleged that the United States is responsible under the fifth amendment for extinguishing their claim under international law (Count V). The Claims Court, Kozinski, *C.J.*, held that the actions of the United States and its derived benefit did not amount to a taking, as a matter of law. *Langenegger* v. *United States,* 5 Cl. Ct. 229 (1984). We affirm as to Counts I and II and remand with directions to dismiss without prejudice as to Count V.

Facts

The facts developed on summary judgment and viewed in their most favorable light for claimants-appellants, are as follows: They are American citizens and residents of Kansas and New Mexico who claim ownership of a large coffee plantation of approximately 4,500 acres, known as Las Lahas, located in El Salvador. Rosa Langenegger, a Salvadoran national and the previous owner of Las Lahas, died in 1978, and appellants' ownership is based on inheritance.

The unfortunate political turmoil that has afflicted El Salvador is known to many in the United States. The 1970's saw political violence become common there, with both leftwing and rightwing extremists pressuring the government. On October 15, 1979, Salvadoran military officers staged a coup d'etat and established a Revolutionary Junta comprised of members of the military and civilians. The new government promised economic, social, and political change, including banking, commerce, labor and human rights reform as well as agrarian reform. As a preliminary step, the Junta promulgated Decree No. 43,

which prohibited transfer of agricultural lands in excess of 100 hectares (247 acres).

The months that followed saw little progress in reform, and violence and demonstrations escalated. Concern grew in the United States that the government of El Salvador was in danger of collapse and that a Marxist government, similar to the then newly-formed government of Nicaragua, might result. It is undisputed and indeed well known in this country that as a matter of foreign policy the United States supports the stability of governments not antagonistic to it and that, in the case of El Salvador, the United States strongly supported the implementation of reforms as necessary to stability. Appellants assert that the level of "encouragement" is in dispute. They allege that the United States tied economic and military assistance to reform, provided financial aid for reform programs, and assisted in drafting the agrarian reform proposals by providing an expert who was under contract to the United States. If the Salvadoran government had not been amenable to United States recommendations, it could have expected a loss of financial support. For summary judgment purposes only, we take all this as true.

On March 6, 1980, the government of El Savlador promulgated Decree No. 153, proposing land reforms which, *inter alia,* provided for expropriation of all agricultural estates over 500 hectares (1,235 acres) and conversion of these properties into cooperatives run by those who work the estates. Owners of the estates were to be compensated with nonnegotiaable bonds said never likely to pay off at anything like the value of the property taken. The decree was implemented in March 1980 and Las Lahas was taken. Appellants have urged the United States Government to help them obtain more, but so far have received no effective assistance.

Discussion

We note at the onset the procedural posture of this case. As this case is presented as a review of a summary judgment, the nonmoving party is given the benefit of all presumptions, inferences, and intendments. Summary jdugment is appropriate only when there is no genuine issue of relevant and material fact. *Adickes* v. *S.H. Kress and Co.*, 398 U.S. 144 (1970). The moving party undertakes the burden to show the absence of a genuine fact dispute; where the moving party prima facie succeeds in its task, it is incumbent upon the nonmoving party to show the existence of factual disputes, which it cannot do by mere assertion, as for example in unsworn pleadings. A fact dispute does not matter if it concerns irrelevant facts. 6 J. Moore, W. Taggard & J. Wicker, *Moore's Federal Practice,* ¶ 56.13[3] (2d ed. 1984). We find no genuine issue of material fact and therefore consider the application of the facts to the law.

The question presented to the court in this case is both a complex and a sensitive one: it is complex as it calls upon this court to consider the jurisprudence of the Just Compensation Clause, a jurisprudence comprised of many precedents but few concrete rules; and sensitive as the government counsels this court to act with restraint and declare the claim at issue nonjusticiable in accordance with the "political question" doctrine. We hold that the circumstances set forth do not present a taking, though this claim is subject to judicial scrutiny.

I

In considering the taking claims, the Claims Court concluded that "[i]mportant considerations of judicial restraint provide an independent basis for refusing to recognize a cause of action on the basis of the facts alleged

by plaintiffs." *Langenegger,* 5 Cl. Ct. at 233. Because the case relates to the relationship between the governments of El Salvador and the United States, the court declared the claims nonjusticiable under the "political question" doctrine. We hold, however, that the political question doctrine does not mandate so sweeping a result.

The seminal discussion of the political question doctrine is found in *Baker* v. *Carr,* 369 U.S. 186 (1962). There the Court stated that

> it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. [Previous cases] show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judical action.

Id. at 211-12.

More recently, three factors for consideration have been presented as determinative of this issue:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

Goldwater v.*Carter,* 444 U.S. 996, 998 (1979). (Powell, J., concurring.)

We have considered the determinative factors and find here that the doctrine does not control this case. We note as well the recent consideration given this issue by our

sister circuit in *Ramirez De Arellano* v. *Weinberger,* 745 F.2d 1500, 1511-15 (D.C. Cir. 1984) (*in banc*). *Ramirez* is clearly distinguishable from the case before us in two important aspects: (1) the District of Columbia Circuit considered the appropriateness of a dismissal of a complaint alleging direct United States expropriation, and (2) the relief requested was that of an injunction to be granted under the Just Compensation Clause, rather than the more mundane request for monetary compensation presented here. While we do not address the D.C. Circuit's resolution of these issues, its consideration of the political question doctrine presents an analysis similarly appropriate to this case.

Consideration of land taking claims are clearly the role of the judiciary according to the Constitution, Amendment V, and ascertainment of "just compensation" is a judicial function, *United States* v. *New River Collieries,* 262 U.S. 341, 343 (1923). The courts have traditionally considered land taking claims, and the Constitution does not provide for a foreign affairs exception. That there should be a case of perhaps admitted government taking, that the courts could not touch with whatever precaution to maintain security, is a proposition we cannot accept. Similarly, the claims before this court require no movement outside the judiciary's traditional role. We note that this case does not require a judicial determination of El Salvador's sovereignty or the appropriateness of its actions, as appellee contends it does; nor does the case question the executive's authority to undertake any action. Appellants explicitly accept that El Salvador is a sovereign government recognized by the United States, that the expropriation was valid, and that by their claims appellants present only a narrow issue: whether the United States' involvement was sufficiently direct and substantial to war-

rant a holding that apart from the taking by El Salvador, there was a taking by the United States obligating it to pay "just compensation."

We disagree with the Claims Court's determination that appellants claim to be damaged by the manner in which our government conducts foreign relations. Such a sweeping characterization is not mandated by the law. Nor do we find that adjudication of the claims would require discussion of sensitive and confidential communications. We note that appellee has been given opportunities to assert the "state secret" privilege and has declined to do so. Such a privilege is absolute and would protect the government from the dangers with which the Claims Court is concerned. *See Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984); *Moliero* v. *FBI*, 749 F.2d 815, 820-21 (D.C. Cir. 1984).

The courts are often presented with questions which consider congressional or executive actions and purposes, and have managed to decide cases without putting the government in a fishbowl. For example, the Court of Claims developed a "good faith effort" test to be applied to Indian taking claims, but held that it would not find a taking where Congress had made a facially or purportedly genuine effort to obtain for the Indians a fair equivalent to land lost through congressional land transactions. *Three Tribes of Fort Berthold Reservation* v. *United States,* 390 F.2d 686 (Ct. Cl. 1968). This doctrine is approved in *United States* v. *Sioux Nation of Indians,* 448 U.S. 371 (1980). The court held that the "good faith effort" standard is an objective one and cannot be shown by private conversations or even floor debates, as these indica of ultrior motives were not proper subjects for judicial investigation. *Three Affiliated Tribes of the Fort Berthold*

Reservation v. *United States,* 204 Ct. Cl. 831, 833 (1974) (Nichols, J., concurring). *See also United States* v. *O'Brien,* 391 U.S. 367 (1968).

The Langeneggers' claims require inquiry into the United States' actions. These actions are to be found from the typical sources: committee reports, executive messages, and other nonsecret documents. Consideration of El Salvador's motives for expropriation is not the central focus of a claim alleging a taking by our country. To the extent that such motivation may be pertinent, we find that the relevant facts reside in what that government "purported" to do. If the "purported" reasons for action are not the real reasons, we think the matter is not one the judicial bench can correct; a subjective determination of a government's motive is beyond judicial inquiry.

Finally, we find that prudential considerations, identified in *Baker* v. *Carr,* do not bar adjudication. Such considerations include:

> [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. *Carr,* 369 U.S. at 217.

We note again that this is a claim of narrow focus, requiring no second-guessing of the executive branch or detailed inquiry into the ulterior motives of the two

governments. While cases involving foreign affairs may make the courts uncomfortable, the Constitution mandates the roles of the judiciary without regard to its comfort. A holding that a taking has occurred is in no way an attribution to the United States of reprehensible conduct. Rather, the assumption is that Congress has provided the safety net of the Tucker Act, 28 U.S.C. §1491, to make sure that its actions will meet the standard of respect for property rights that the Constitution requires. *Regional Rail Reorganization Cases,* 419 U.S. 102, 126 (1974). Ultimately, the political question doctrine is rooted in concern for the separation of powers, *Baker* v. *Carr*, 369 U.S. at 210; the doctrine is one of " 'political questions,' not one of 'political cases.' " *Id.* at 217. As this case seeks only a determination of the lawfulness of the executive's deprivation of appellants' private property without just compensation, it is justiciable.

II

The Just Compensation Clause was designed to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Thus, whether a particular act by the government amounts to a taking ultimately depends in large part on the particular circumstances of the case. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

While interpretations of the Just Compensation Clause indeed are nebulous, especially where a foreign government's involvement exists, several established authorities serve as useful guides. It is settled law that the United States is bound by our Constitution when it takes actions

that affect citizens outside our territory, *Reid* v. *Covert*, 354 U.S. 1, 5 (1957); therefore the government must provide just compensation for takings by its forces which occur abroad, when not acts of war. *Seery* v. *United States*, 130 Ct. Cl. 481 (1955). It is also an accepted principle that it is not essential for the government to have taken property for its own use for a taking to be found. *Hawaii Housing Authority* v. *Midkiff*, 52 USLW 4673 (U.S. May 30, 1984). "A taking can occur simply when the Government by its actions deprives the owner of all or most of his interest in his property," *Aris Gloves, Inc.* v. *United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970), and "[t]here can be a taking if the Government makes it possible for someone else to obtain the use or benefit of another person's property." *Id.* The United States may be held responsible for a a taking even when its action is not the final direct cause of the property loss or damage. "[I]n any case where government action is causally related to private misconduct which leads to property damage — *a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment.*" *National Board of YMCA* v. *United States*, 395 U.S. 85, 93 (1969) (emphasis supplied).

Taken together, these precedents themselves do not preclude the appellants' claims. There is nothing to suggest, as appellee contends, that *whenever* the final act of expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible. When considering a possible taking, *the focus is not on the acts of others, but on whether sufficient direct and substantial United States involvement exists.*

This court's predecessor, the Court of Claims, previous-

ly had opportunities to consider the level of involvement necessary to hold the United States responsible for a foreign-based taking. In *Turney* v. *United States,* 115 F. Supp. 457 (Ct. Cl. 1953), the court was presented with circumstances found to be sufficient. *Turney* involved an embargo formally enacted by the Philippine Government. Following the post-War inception of the Republic of the Philippines, the United States Pacific Air Service Command conveyed to the Philippines certain surplus supplies found at the Leyte Air Depot. The surplus was sold, but it was discovered later that radar equipment was among the items at the depot. After the new owner, a corporation, entered into negotiations to sell the equipment to the Chinese Air Force, the United States objected to the sale on security grounds, and notified the corporation that it would repossess the radar by negotiation or seizure, with the aid of the Philippine Government. The Philippine Government, aware that the United States desired to repossess, placed an embargo upon the exportation of the radar. Ultimately, the United States received the equipment in exchange for a receipt and reservation of the right to sue for value.

The Court of Claims found that the exchange amounted to a taking covered by the fifth amendment.

> The relations, *** between our Government and the Philippine Goverment, were close. Our armed forces had just liberated the Philippines ***. Our Government had given one hundred million dollars worth of surplus property to the Philippines, * * * and had sold the property for the account of the Philippine Government. When we requested that Government to place an embargo upon the exportation of any of the property, it, naturally, readily complied. That put irresistible

> pressure upon the corporation to come to terms with the United Sates Army ***. We think that the taking occurred *** when the Army officially took possession.

Turney, 115 F. Supp. at 463.

The Court of Claims holding thus rested upon the finding that the Army's request for the embargo was substantial, direct involvement, forcing the corporation to exchange the radar. The benefit to the United States was clear; the Army reacquired the radar it mistakenly had sold.

The Court of Claims again considered the level of United States involvement necessary for a foreign-based taking in *Anglo Chinese Shipping Co.* v. *United States*, 127 F. Supp. 553, *cert. denied*, 349 U.S. 938 (1955). There the Supreme Commander for the Allied Powers, commander of an association of sovereign states including the United States, directed the Imperial Japanese Government to retain a vessel, the *S.S. Josephine Moller*, for the purpose of laying and repairing submarine cables. The court held that the United States, by way of the Allied Powers, had not undertaken a taking. As in *Turney*, the court looked to the nature of the United States involvement and to the benefit secured. The court found that the Supreme Commander directed Japan to retain the ship, which Japan had seized during the conquest of Hong Kong, only because Japan was powerless to act without the approval of the Allies. Such was the condition of Japan's surrender and the Allies' decision to allow Japan to continue limited self-rule. Japan alone originally undertook to retain the vessel and use it in the manner later ordered; the Supreme Commander's directive was only a necessary final approval. The court considered the Allies' minimal involvement, and the incidental nature of the benefit to the occupying powers, as controlling. *See also Best* v. *United*

States, 154 Ct. Cl. 827 (1961) (requisition by U.S. Army in occupied Germany).

The Langeneggers' claim falls within the factual situations of neither *Turney, Anglo Chinese Shipping,* nor *Best.* The method of analysis of those cases, as well as the general doctrines enunciated by the Supreme Court, however, are controlling here. These precedents clearly establish that in determining whether a taking exists where a foreign government's actions are involved, the focus of the inquiry is the same as that undertaken in a domestic taking case: the court must consider whether the *United States'* involvement was sufficiently direct and substantial to warrant its responsibility under the fifth amendment. *See Porter* v. *United States,* 496 F.2d 583, 591 (Ct. Cl. 1974), *cert. denied,* 420 U.S., 1004 (1975). This determination of "sufficiently direct and substantial involvement" when actions of a foreign government are involved has been premised upon the sum of two factors; (1) the nature of the United Staates' activity, and (2) the level of the benefit the United States has derived.

Since *Porter* holds that in the circumstances of that case acts of the then government of the Pacific Islands Trust Territory, though controlled in the United States Department of the Interior, cannot be imputed to the United States in a Tucker Act suit under either a contract or a taking theory, acts of an independent sovereign are excluded *a fortiori.* Where the actual expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible merely because its activity is that of "friendly" persuasion regarding general policy, common among allies, or when the sole benefit to the United States is the political stability of its neighbors. Diplomatic persuasion among allies is a common occurrence, and as a matter of law, cannot be deemed sufficiently irresistible to warrant a

finding of direct and substantial involvement, however difficult refusal may be as a practical matter. Such "nebulous forms of United States influence *** are insufficient to make defendant constructively responsible for the taking alleged." *Porter,* 496 F.2d at 592. Similarly, a benefit of hemispheric stability must be characterized as a benefit only incidental to the expropriation. The expropriation by the foreign sovereign's legislation was for the benefit of that country's national interest as perceived by the national leaders, and was not for the United States' public benefit.

If the United States is to be held liable for a taking by federal officers under the fifth amendment and 28 U.S.C. § 1491, it is also a legal requirement that the acts of the officers be authorized, expressly or by implication, *Regional Rail Reorganization Cases,* 419 U.S. at 127.

> Cases of "inverse" takings without physical invasion or ouster [by U.S. officials] are not very numerous, and when they occur, as in *** [citing cases] this court has been careful to consider the role of Congress, and the taking, if not expressly authorized or directed by Congress, at least is a natural consequence of Congressionally approval measures.

NBH Land Co. v. *United States,* 576 F.2d 317, 319 (1978).

This, of course, includes instances where Congress never adverted to the possibility of land invasion or acquisition per se; thus United States military flyers were held to effect a taking of rights in air space used by them, landing or taking off while on practice flights in their normal manner. *United States* v. *Causby,* 328 U.S. 256, 267 (1946). However, it has been held that United States officials can hardly effect a taking by measures, however, drastic, they merely advocate should be taken by state or local officials,

NBH Land Co., supra, De-Tom Enterprises, Inc. v. *United States,* 552 F.2d 337 (1977).

It is our view also that one who owns land in a foreign country looks to the laws of that country to determine his incidents of ownership including his rights in the event of expropriation. He may look also to international law if a foreigner in the expropriating country, but that is a secondary backup that does not vary the source of his primary rights.

Appellants assert as an alternative claim that the United States' "encouragement" of El Salvador extinguished appellants' possible claim under international law; this claim extinguishment allegedly is a taking violative of the fifth amendment. The Claims Court below incorrectly held that appellants' claim was nonjusticiable and that the extinguishment of a claim under international law cannot amount to a taking; the court relied on *Shanghai Power Co* v. *United States,* 4 C. Ct. 237 (1983).

In *Shanghai Power,* the Claims Court was presented with a claim by former owners of property held by the Peoples' Republic of China. Plaintiffs, in that case, had lost their properties when the Peoples' Republic ascended to power and nationalized their holdings. In 1979, President Carter established diplomatic relations with the Peoples' Republic, and the two nations settled outstanding claims of United States nationals against China as part of the normalization process. Plaintiffs claimed that by settling their claims for less than the value of the original property located in China, the United States took their property in violation of the fifth amendment.

The Claims Court properly held the claims plaintiffs had against China under international law were a property right, but that a taking did not exist based on all the cir-

cumstances, and this court affirmed. We note, however, that the lower court's *Shanghai Power* decision does not present an absolute rule that the extinguishment of a claim under international law can never amount to a taking. "[T]he determination must be made on the basis of 'the particular circumstances [of each] case'." *Shanghai Power*, 4 Ct. Cl. at 242 (quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (quoting *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

It was actual extinguishment, absent here, that created whatever closeness there was in the *Shanghai Power* case. With no extinguishment, this aspect of the claim is wholly without substance. In the case before us, appellants assert that the State Department has been uncooperative and will not attempt a diplomatic settlement with El Salvador. Appellee counters that it is the appellants who are uncooperative, and that El Salvador has agreed to abide by the Carribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Title II, 97 Stat. 384 (1983), and therefore to allow international arbitration to resolve this conflict, if only appellants would avail themselves of that forum. The government contends that appellants may proceed internationally without government assistance, according to the Act. As appellants have not provided evidence to the contrary, we find that the international forum is available and that the claim has not yet been extinguished. Thus the claim of appellants under Count V of their complaint must be dismissed, without prejudice. The Claims Court Judgment as to Count V is vacated.

CONCLUSION

The Claim Court's decision on Counts I and II is affirmed. Count V is vacated and the case is remanded with directions to dismiss Count V without prejudice to a new proceeding if actual extinguishment can be shown.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

In the United States Claims Court

FRED E. LANGENEGGER, *et al.*, *Plaintiffs,*	:	No. 108-81L
v.	:	Taking; expropriation by foreign government of property owned by U.S. citizens; liability of United States for acts of foreign government; joint venture doctrine; judicial involvement in foreign affairs; jurisdiction; due process clause; 22 U.S.C. § 2370(e)(1).
THE UNITED STATES, *Defendant.*	:	

Michael B. Sheppard, Washington, D.C., with whom were *Leva, Hawes, Symington, Martin & Oppenheimer,* for plaintiffs.

James T. Draude, Washington, D.C., with whom was *Assistant Attorney General F. Henry Habicht, II,* for defendant.

OPINION

KOZINSKI, Chief Judge.

This unusual case presents the question whether the United States must compensate American landowners for the loss suffered when their land is expropriated by a foreign government pursuant to its land reform program.

Facts

Plaintiffs are U.S. citizens each of whom owned an interest in Las Lahas, a large coffee plantation located in El Salvador. On October 15, 1979, a group of Salvadoran

military officers ousted the country's existing government and established a "Revolutionary Junta of Government." The Junta declared its intent to enact a program of economic, political and social reforms, including agrarian reform. Despite significant social and political unrest, the Junta began implementing agrarian reform by adopting Decree No. 43 on December 7, 1979. This decree prohibited the transfer of agricultural lands in excess of 100 hectares.

On March 6, 1980, the government of El Salvador promulgated Decree No. 153, the Basic Law of Agrarian Reform, providing for the expropriation of large agricultural landholdings such as Las Lahas. Las Lahas was confiscated the next day. Decree No. 153 provided that owners of seized land would be compensated with long term bonds rather than with cash. Plaintiffs claim that the Salvadoran bonds are worthless and therefore that they have not received adequate compenstion for the taking of their land.

Plaintiffs assert that the United States was responsible for the planning, implementation and financing of the Salvadoran agrarian reform program. Specifically, they claim that El Salvador's government was dependent upon the United States for survival and that the United States exerted intense pressure on El Salvador, causing the Junta to adopt the agrarian reform program embodied in Decree No. 153. They argue that the United States is responsible for the expropriation of Las Lahas, which served the foreign policy objectives of the United States. According to plaintiffs, this constitutes a taking of their property for public purposes requiring compensation pursuant to the fifth amendment. Plaintiffs also assert a right to compensation under the fifth amendment's due process clause and 22 U.S.C. § 2370(e)(1) (1982).

Defendant has moved for summary judgment.

DISCUSSION

A. *The Fifth Amendment Taking Claim*

Plaintiffs' principal argument is that the United States took their property for a public purpose by persuading or prevailing upon the government of El Salvador to undertake the agrarian reform program that resulted in Decree No. 153 and the confiscation of Las Lahas. At issue is whether the actions allegedly taken by the United States can form a basis for recovery under the fifth amendment.

1. It is now well established that the United States is bound by the Constitution when it takes actions that affect the rights of its citizens, even if those actions are taken outside our country's territorial boundaries. *See Reid* v. *Covert,* 354 U.S. 1, 5 (1957). More specifically, the Court of Claims has held that the United States must provide compensation for the taking of property owned by American nationals, even though the property and the taking occurred abroad. *Seery* v. *United States,* 130 Ct. Cl. 481 (1955) (plaintiff's property in Austria used by U.S. Army as an officers' club). On the other hand, the Court of Claims has refused to hold the United States responsible where the actions constituting the taking were performed by a foreign government. *Huther* v. *United States,* 136 Ct. Cl. 655 (1956) (United States not liable where Canada constructed dam that caused flooding of plaintiffs' land). *Turney* v. *United States,* 126 Ct. Cl. 202 (1953), is particularly instructive in this regard. In that case, the United States enlisted the help of the Philippine government in efforts to recover classified military radar equipment that had mistakenly been sold to plaintiff. The court determined that the imposition of an embargo by the Philippine government prohibiting exportation of the radar effectively destroyed its value and put "irresistible pressure" on plain-

tiffs to return the radar to the United States. *Id.* at 214. Significantly, however, the court held that the taking by the United States only occurred on the date when the United States itself took possession of the radar. *Id.*

Even more significant, perhaps controlling, is *Anglo Chinese Shipping Co.* v. *United States,* 130 Ct. Cl. 361, *cert. denied,* 349 U.S. 938 (1955). That case involved the actions of General Douglas MacArthur in his capacity as Supreme Commander of the Allied Powers in post-World War II Japan. General MacArthur ordered the retention of plaintiff's vessel for use by the government of Japan in cable-laying operations. The court acknowledged that the Supreme Allied Commander was acting on behalf of the Allied Powers and therefore that any action taken by him was taken "as the agent of [each of the Allied powers, including the United States]." *Id.* at 366. Nevertheless, the Court of Claims held that the United States was not liable because the vessel was taken and used for the benefit of Japan, not for the benefit of the Allied Powers. *Id.* at 367-68. In so holding, the court was unimpressed by the fact that General MacArthur, on behalf of the United States and the Allied Powers, may have "approved . . . or even directed" Japan's activities. *Id.* at 368. The court also rejected the argument that there was a taking because the Allied Powers derived merely an incidental benefit from the seizure. Such an incidental benefit was deemed too remote to form the basis of a taking claim. *Id.* at 367.

When read together, these Court of Claims precedents squarely support the view that compensation under the fifth amendment will only be awarded where authorized agents of the United States participate in the taking and where the United States is the direct beneficiary thereof. Where the taking is accomplished by a foreign government, or where a foreign government is the principal beneficiary,

the United States is not liable under the fifth amendment even if it participated in the foreign government's action or derived an incidental benefit therefrom. *See also De-Tom Enterprises, Inc.* v. *United States,* 213 Ct. Cl. 362, 364-65 (1977) (action of the United States in dissuading local government from adopting zoning change that could have been beneficial to plaintiff was not a taking); *cf. Custom Contemporary Homes, Inc.* v. *United States,* No. 53-83L (Cl. Ct. April 25, 1984) (federal participation in highway project does not render United States jointly liable for taking of property).

The seizure of Las Lahas was carried out by the government of El Salvador under a decree enacted in accordance with Salvadoran law.[1] Even if one accepts for purposes of this motion all of plaintiffs' allegations about the degree of our government's involvement and influence in the domestic affairs of El Salvador, it would still be far less than the involvement of the Allied Powers in the operation of the Japanese government in *Anglo Chinese Shipping.* Moreover, plaintiffs do not allege that the United States received any direct interest in Las Lahas; they admit that the property was used exclusively by the government of El Salvador. Even if the court were persuaded that the United States derived certain collateral benefits from the Salvadoran land reform program, and consequently from the seizure of Las Lahas, those benefits are so remote as not to support a taking claim under the rationale of *Anglo Chinese Shipping.*

Plaintiffs nevertheless point to cases in other circuits holding that the United States may be responsible for the

[1]Plaintiffs have not challenged the taking of Las Lahas in the Salvadoran courts and have not explained their failure to do so. The court must therefore presume that the taking of Las Lahas conformed with Salvadoran law. *See De-Tom Enterprises, Inc.,* 213 Ct. Cl. at 363-64.

acts of foreign officials if U.S. agents were sufficiently involved in the activity to establish a joint venture between the two governments. *See, e.g., United States* v. *Hensel,* 699 F.2d 18, 25 (1st Cir.), *cert. denied,* 461 U.S. ____, 103 S. Ct. 2431 (1983); *Stonehill* v. *United States,* 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969). It should first be noted that any inconsistency between these cases and the decisions of the Court of Claims must be resolved in favor of the Court of Claims precedents, which constitute controlling authority. General Order No. 1, 1 Cl. Ct. XXI (1982); *South Corp.* v. *United States,* 690 F.2d 1368, 1370 (Fed. Cir. 1982). In any event, these decisioins are distinguishable.

The cases cited by plaintiffs involve situations where it was alleged that U.S. law enforcement officials collaborated with officials of foreign governments to obtain evidence by means which would have been prohibited in the United States by our Bill of Rights. The question arose whether such evidence ought to be suppressed in criminal proceedings conducted in our courts against the individuals from whom the evidence was obtained. In reaching their decisions the courts applied the well established joint venture doctrine.[2] That doctrine prohibits the United States from circumventing the exclusionary rule by collaborating with officials of another jurisdiction to accomplish indirectly what it cannot lawfully accomplish directly. *Hensel,* 699

[2]The joint venture doctrine was developed in the context of cases involving collaboration between state and federal officials at a time when the exclusionary rule applied to federal but not to state criminal proceedings. Evidence provided to U.S. law enforcement officials by state or local officials was suppressed if the federal officials were so involved in the search for the evidence "that the search in substance and effect was a joint operation of the local and federal officers." *Byars* v. *United States,* 273 U.S. 28, 33 (1927).

F.2d at 25; *United States* v. *Emery,* 591 F.2d 1266, 1267 (9th Cir. 1978); *Stonehill,* 405 F.2d at 743.

This line of cases represents a logical extension of the judicially-created exclusionary rule, a rule designed to maintain the integrity of our criminal proceedings by precluding the use of evidence that has been obtained in an unlawful manner. Given the special respect that our system of justice affords to criminal proceedings, and the perceived need to assure that prosecutors cut all corners squarely in securing convictions, it is understandable that evidence would be excluded when obtained by our law enforcement officers in a questionable or unlawful manner. Exclusion of the evidence in such cases is consistent with the theory of the Court of Claims cases discussed above. Where the United States introduces illegally seized evidence in a criminal trial, it derives an immediate and direct benefit from the unlawful conduct. As discussed earlier, however, the United States here has derived at best an incidental and indirect benefit from the seizure of Las Lahas. Thus the logic of the exclusionary rule cases does not extend to this case.

2. Important considerations of judicial restraint provide an independent basis for refusing to recognize a cause of action on the basis of the facts alleged by plaintiffs. The crux of plaintiffs' case is that the United States exercised such control or influence over the government of El Salvador as to cause it to adopt the agrarian reform program. The case raises concerns about the competence of the judicial branch to resolve the issues presented, and poses the risk that by attempting to do so the court may impermissibly intrude into an area committed by the Constitution to the political branches of our government. *See Baker* v. *Carr,* 369 U.S. 186, 211-13 (1962); *Shanghai Power Co.* v.

United States, 4 Cl. Ct. 237, 247-49 (1983), *appeal docketed,* No. 84,860 (Fed. Cir. Feb. 28, 1984).

It is of paramount significance that the activities on which plaintiffs base their case go to the very heart of the relationship between our government and that of El Salvador. In effect plaintiffs claim to have been damaged by the manner in which the President, our Ambassador to El Salvador and other senior government officials conducted the foreign relations of the United States. The area of foreign relations is, of course, where our Constitution affords the broadest discretion to the President, *see United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-20 (1936), and where involvement by the courts must be kept to a minimum. *See Ex parte Peru,* 318 U.S. 578, 588 (1943). The reasons for this are clear and have been noted repeatedly: In the area of foreign relations the nation must speak with a single voice, unencumbered by the diversity of opinion that is so characteristic of our system of government and our way of life. *Baker* v. *Carr,* 369 U.S. at 211. Secrecy is often necessary for the President to successfully conduct our foreign affairs; intrusioin into the process by other branches of the government may render it difficult or impossible to maintain the integrity of classified information. *Curtiss-Wright,* 299 U.S. at 320. Our relationship with other nations frequently depends not only upon achieving substantive results but also upon safeguarding the honor, dignity and sensibilities of other sovereigns; exposing the process to judicial scrutiny may cause embarassment to the President and to the sovereigns with whom he must deal. *Shanghai Power,* 4 Cl. Ct. at 248. Finally, but far from least important, the field of foreign relations frequently presents issues not capable of judicial resolution because there are not judicially manageable standards to apply. *Baker* v. *Carr,* 369 U.S. at 211.

These considerations counsel strongly against assertion of judicial authority in this case. Plaintiffs' proposed lawsuit would require the court to examine in considerable detail the relationship between our government and that of El Salvador at the very highest levels. This has already required access to classified documents. Additionally, the court granted plaintiffs' motion to depose senior State Department officials including the person who was our Ambassador to El Salvador when Las Lahas was expropriated. If the lawsuit were allowed to continue to the merits, it might well require the testimony of other present and past officials of our government, perhaps including President Carter, and also, quite conceivably, officials of the government of El Salvador. Indeed, while plaintiffs may be unable or unwilling to present the testimony of Salvadoran officials, defendant might well be placed in the position of needing their testimony to rebut or clarify evidence presented by plaintiffs. The possibility that our government will be embarrassed in the international sphere or that classified information will be divulged is manifest.[3]

The litigation could embarrass relations between our country and El Salvador in other ways as well. Plaintiffs claim that the government of El Salvador undertook the agrarian reform program as a result of pressure from the United States and not because it considered this to be the best course of action for its people. In essence, plaintiffs are asserting that the United States meddled in the internal affairs of El Salvador and that the Salvadoran government

[3]While the classified documents in this case are held *in camera*, the court cannot minimize the possibility of inadvertent disclosure and the consequent danger to our security. While this concern ought not to preclude all lawsuits where classified information must be divulged, it is certainly a factor that must be considered in weighing the appropriateness of judicial involvement.

permitted this to happen. A ruling by this court in favor of plaintiffs could be a serious affront to the dignity of El Salvador,[4] with an obvious impact on the delicate relations between the two governments.[5]

The President has the power to grant recognition to a foreign country and establish diplomatic relations with its government; the decision whether to do so is not subject to review by the judiciary. *United States* v. *Pink,* 315 U.S. 203, 229-30 (1942). After the Revolutionary Junta of Government took over in El Salvador, our State Department promptly declared its intention to continue diplomatic relations. U.S. Department of State, *Digest of United States Practice in International Law* 127-28 (1979). By its actions, our government has taken the position that the new Salvadoran government had control over the territory and population of the country, and was capable of engaging in foreign relations with other nations as an independent sovereign. *See generally* Restatement (Second) of Foreign Relations Law of the United States §§ 4, 100, 101 (1965); 1 M. Whiteman, *Digest of International Law* § 14 (1963).

Plaintiffs' theory of what lay behind the enactment of Decree No. 153 is fundamentally at odds with the position taken by our government. Plaintiffs suggest — and would attempt to prove — that the government of El Salvador was not an independent sovereign after all, but conducted its internal affairs at the bidding of the United States.

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[4]Even if the court's ruling were kept under seal, a judgment for plaintiffs could only be read as premised on such a finding.

[5]As the Supreme Court has noted, "[t]o permit the validity of the acts of one sovereign State to be reexamiend and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 304 (1918).

Under plaintiffs' theory of what happened, the United States and El Salvador dealt not as sovereign equals but as master and servant. An attempt to determine whether plaintiffs' view is correct would arrogate to the court the power to redefine our relationship with El Salvador.[6] This would be no less an intrusion upon the prerogatives of the President than that eschewed by the Supreme Court in *Pink*. 315 U.S. at 230. So long as our government takes the position that El Salvador is an independent, sovereign state, the court must conclusively presume that the Salvadoran government acted on its own initiative to promote its country's best interests when it exercised the quintessentially sovereign power of making law. *See United States* v. *Belmont,* 301 U.S. 324, 328 (1937) ("who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts").

Finally, pursuing the inquiry suggested by plaintiffs would take the court into an area devoid of the types of standards courts are equipped to apply. Plaintiffs' claim, once again, is that the United States exerted such influence over the government of El Salvador as to cause adoption of a land reform program that would otherwise not have been adopted. In resolving this dispute, the court would not only have to intimately examine the relationship between the two governments but also determine what El Salvador would have done had the United States not inter-

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[6]Indeed, plaintiffs go so far as to assert that the Salvadoran government was created by the United States, a proposition officially denied by our State Department. U.S. Department of State, *Digest of United States Practice in International Law* 128 (denial that "the United States had been connected with or involved indirectly in the coup, or had encouraged it in any way"). It would be highly improper for the court to second-guess the State Department's position on this issue.

vened. In essence, the court would be asked to guess how the Salvadoran government would have exercised its legislative powers. To appreciate the futility of this task one need only posit a lawsuit where the court is asked to determine what Congress would have done in 1980 if some particular circumstance had been different. A court is surely incapable of making that type of determination even in the domestic context. It would be entirely impossible, perhaps improper, for the court to determine what legislative judgment a foreign government would have made.[7]

Of course, not all actions of our government in the internatonal arena are exempt from judicial scrutiny. The Supreme Court has urged courts to examine carefully each case in light of the applicable considerations. *Baker* v. *Carr,* 369 U.S. at 211-12. Many cases that appear to involve sensitive matters of our foreign relations in fact turn out to be fully susceptible to resolution by the judiciary. *E.g., Ramirez de Arellano* v. *Weinberger,* 724 F.2d 143, 147 (D.C. Cir. 1983) (plaintiff's allegation that the United States improperly used his property abroad did not present a nonjusticiable political question). Perhaps the clearest example of such cases are those involving the exclusionary rule, discussed above. *See* p. 4 *supra.* Those cases do not

[7]Plaintiffs' lawsuit would raise other significant issues that the court is ill equipped to resolve. For example, a predicate of plaintiffs' claim is that they received no compensation for their land from El Salvador. *See* p. 2 *supra.* Resolution of this issue would require the court to examine — and pass upon — the adequacy of El Salvador's compensation program. Quite aside from the potential slight to El Salvador, the inquiry would require the court to determine the value of foreign land, the effect of El Salvador's changed political situation upon that value, the value of the bonds plaintiffs received in exchange for the property, whether the Salvadoran government is likely to comply with the terms of the bonds or offer additional compensation, and whether the plaintiffs have any remedy under Salvadoran law if the compensation they receive proves to be inadequate.

implicate the foreign relations of the United States and present an issue – suppression of illegally seized evidence – that calls for the straightforward application of standards with which the judiciary is familiar.[8] By contrast, plaintiffs' lawsuit goes to the very heart of our diplomatic relations with a foreign government and raises issues not capable of judicial resolution. As the Chief Justice has stated in an analogous situation, "the needs of a system of government sometimes must outweigh the right of individuals to collect damages." *Nixon* v*Fitzgerald,* 457 U.S. 731, 759 (1982) (Burger, C.J., concurring).[9]

B. *The Other Claims*

1. Plaintiffs also claim that the involvement of the United States in the planning and implementation of El Salvador's land reform program constituted a waiver of their claim against El Salvador under international law. Plaintiffs argue that this waiver constituted a taking of that claim (as opposed to a taking of the property itself) and that such taking is subject to compensation under the fifth amendment.

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[8]*Berlin Democratic Club* v. *Rumsfeld,* 410 F. Supp. 144 (D.D.C. 1976), upon which plaintiffs rely, is distinguishable on similar grounds. Like the exclusionary rule case, *Berlin Democratic Club* involved dealings of officials at relatively low levels. The case did not implicate the actions of the President, the conduct of our foreign relations or the legislative powers of a foreign government.

[9]One commentator has suggested that the existence of a judicial remedy for actions taken by our foreign policy officials unduly burdens the conduct of our foreign relations because of the "restraining effect of legal and budgetary forces within the bureaucratic process." Trimble, *Foreign Policy Frustrated* – Dames & Moore, *Claims Court Jurisdiction and a New Raid on the Treasury,* 84 Col. L. Rev. 317, 375 (1984). In this commentator's view, persons who suffer as a result of our foreign relations ought to be relegated to the political arena, the traditional forum for resolving such issues. *Id.* at 382.

Plaintiffs' waiver claim is premised upon the same factual showing as their claim that the United States took Las Lahas. For many of the reasons discussed above, the court must refrain from adjudicating the extent and nature of our government's involvement in El Salvador's decision to implement the agrarian reform program. In addition, even if it were established that our government has waived or compromised plaintiffs' claim under international law, such action would not be a basis for compensation under the fifth amendment. *See Shanghai Power Co.*, 4 Cl. Ct. at 243-46.

3. Plaintiffs also argue that our government's actions constitute a violation of their rights under the due process clause of the fifth amendment. Quite aside from other considerations, our precedents establish that the due process clause cannot form the basis of a claim for money damages within the jurisdiction of this court. *See, e.g., Inupiat Community of the Arctic Slope* v. *United States,* 230 Ct. Cl. 647, 662, *cert. denied,* 459 U.S. 969 (1982); *Walton* v. *United States,* 213 Ct. Cl. 755, 757 (1977); *Muehlen* v. *United States,* 209 Ct. Cl. 690 (1976).

4. Finally, plaintiffs seek to recover under 22 U.S.C. § 2370 (e)(1) (1982), which requires the President to suspend assistance to any country that seizes the property of American citizens without providing compensation for the seizure. Section 2370(e)(1) is simply a directive to the President to take certain action, it does not mandate the payment of money. The court therefore lacks jurisdiction over plaintiffs' claim. *See United States* v. *Mitchell,* 463 U.S. ____, ____, 103 S. Ct. 2961, 2968 (1983); *cf. Aerotrade, Inc.* v. *Agency for International Development, Dep't of State,* 387 F. Supp. 974, 976 (D.D.C. 1974) (courts lack jurisdiction to compel President's compliance with section 2370(e)(1)).

Conclusion

Defendant's motion for summary judgment is granted. The clerk is directed to dismiss the complaint and award costs to the prevailing party. 28 U.S.C. § 2412(a) (1982); RUSCC 54(d).

May 14, 1984

United States Court of Appeals
for the Federal Circuit

FRED E. LANGENEGGER
STEVEN W. LANGENEGGER, ET AL.,
Appellants,

No. 84-1420

108-81L

v.

THE UNITED STATES,
Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: The Claims Court's decision on Counts I and II is AFFIRMED. Count V is VACATED and the case is REMANDED with directions to dismiss Count V without prejudice to a new proceeding if actual extinguishment can be shown.

DATED March 12, 1985

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

/s/ Dorothy I. Myers
Chief Deputy Clerk

ISSUED AS A MANDATE: April 17, 1985

IN THE UNITED STATES COURT OF CLAIMS

No. 108-81 L

FRED E. LANGENEGGER,
Route 3, Box 89
Whitewater, Kansas 67114

STEVEN W. LANGENEGGER,
Route 2, Box 14
Burns, Kansas 66840

JAMES LANGENEGGER; as Administrator
of the Estate of
Zula Langenegger
P.O. Box 12
Hagerman, New Mexico 88232

IDA ANNA NOLDER,
1936 Beck Street,
Manhattan, Kansas 66502

FLOREINE EDITH STANGLE
843 Brownthresh Lane
Wichita, Kansas 67212

and

EMMA FRIEDA ZUERCHER
Route 1
Benton, Kansas 67017

Plaintiffs

V.

UNITED STATES,

Defendant

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OF CLAIMS

PETITION

To the Honorable, the Court of Claims:

The above-named plaintiffs respectfully represent:

NATURE OF THE CLAIM

1. This is a claim for just compensation for real and personal property unlawfully taken by and as a result of the actions of the defendant, the United States, in violation of the plaintiffs' rights under the Fifth Amendment to the United States Constitution; for just compensation for certain legal rights and claims relating to such property which were taken by the defendant in violation of the plaintiffs' rights under the Fifth Amendment to the United States Constitution; and for damages for the defendant's violation of Section 620(e)(1) of the Foreign Assistance Act, as amended, 22 U.S.C. § 2370(e)(1).

THE PROPERTY

2. The property involved in this claim is a farm, known as "Las Lahas," located in El Salvador, which was forcibly seized, by and as a direct and effective result of the actions and directives of the defendant, on or about March 7, 1980, as well as personal property situated on the farm at that time, which also was seized. (The term "Las Lahas" is used hereinafter to include, as appropriate, both the real property and the personal property which was taken.) No compensation has been paid or offered for the taking of Las Lahas.

THE PLAINTIFFS

3. The above-named plaintiffs are all citizens and residents of the United States. Plaintiffs Fred E.

Langenegger, Steven W. Langenegger, Ida Anna Nolder, Floreine Edith Stangle and Emma Frieda Zuercher were each the beneficial owners of an undivided one-tenth ownership interest in Las Lahas at the time of the taking.

4. Plaintiff James Langenegger is the administrator of the estate of Zula Langenegger, who died in December, 1980, and who was the beneficial owner of an undivided one-tenth ownership interest in Las Lahas at the time of the taking. Zula Langenegger had received her interest in Las Lahas under the will of her husband, Ernest Langenegger, who died in 1979. Zula and Ernest Langenegger were both United States citizens and all of the heirs of Zula Langenegger's estate are United States citizens. For ease of expression, the term "plaintiffs" as used herein sometimes includes Zula Langenegger and/or Ernest Langenegger, it being understood however that their former interests in Las Lahas are now represented by James Langenegger, as Administrator.

JURISDICTION

5. This Court has jurisdiction over this claim by virtue of 28 U.S.C. § 1491. The claim is founded upon the United States Constitution and federal statute. The amount in controversy exceeds $20,000,000.

BACKGROUND

6. Las Lahas is a large farm located in El Salvador. It comprises approximately 4,500 acres and its principal crop is coffee. At the time it was taken in March, 1980, its fair value exceeded $20,000,000.

7. The plaintiffs, all United States citizens, acquired their ownership rights in Las Lahas as heirs of their

cousin, Blanca Rosa Langenegger, who died in 1978. Their ownership rights in Las Lahas were recognized and confirmed by the El Salvadorean court having jurisdiction over the estate of Blanca Rosa Langenegger in decrees issued in February, 1979 and March, 1979, and such rights have never been subsequently challenged. Four other cousins of Blanca Rosa Langenegger, who are not United States citizens and are not plaintiffs in this action, also inherited undivided one-tenth ownership interests in Las Lahas.

8. Subsequent to the death of Blanca Rosa Langenegger, the plaintiffs and the four other heirs administered and operated Las Lahas, paid approximately $1,500,000 in inheritance taxes to the Government of El Salvador, and expended substantial additional sums to improve the living and working conditions of the employees at Las Lahas, and to increase coffee production at Las Lahas. Their efforts and actions to improve the living and working conditions of employees included construction of new brick homes for employees, construction of a new water storage tank and fresh water piping to employee homes, construction of a new chapel, and enlargement and improvement of a tortilla factory for the employees. Their actions to increase coffee production, which were realistically expected to triple production, included hiring of an expert on a full time basis, growing 240,000 new young coffee plants, constructing a new pumping plant for irrigation, and enlarging and modernizing the coffee processing mill.

THE TAKING OF LAS LAHAS

9. Las Lahas was physically seized by military and/or police forces of the Government of El Salvador on or about March 7, 1980, acting under the authority of Decree No. 153, which was promulgated by El Salvador's "Revolutionary Junta of Government" on or about March 6, 1980, and which provided for the expropriation of large agricultural landholdings in El Salvador. Although the physical seizure was carried out primarily by forces of the Government of El Salvador, the defendant assisted in such seizure and, as explained more fully hereinafter, the defendant was directly responsible for the preparation, adoption, and implementation of Decree No. 153 and for the taking of Las Lahas.

10. As a result of the seizure and Decree No. 153, the plaintiffs have been deprived of both possession and ownership of Las Lahas and no compensation has been paid or offered for such taking, either by the defendant or by the Government of El Salvador.

11. Decree No. 153 contains provisions which, if followed in the future, would offer token compensation in the form of 30-year El Salvadorean government bonds having a face value of only a small fraction of the fair value of Las Lahas. The bonds would be non-negotiable, bear only a nominal rate of interest, and would have no meaningful value. Officials of the U.S. State Department have acknowledged that such bonds would not be just compensation for Las Lahas, have characterized the bonds as being no more valuable than Confederate money, and have suggested that they might best be used as wallpaper.

THE DEFENDANT'S ACTIONS IN THE TAKING OF LAS LAHAS

12. As explained more fully in the following paragraphs, the taking of Las Lahas was for a "public purpose" within the meaning of the Fifth Amendment to the United States Constitution and such taking was accomplished by, and resulted from, the actions of the defendant, who drafted and paid for the preparation of Decree No. 153, who persuaded and pressured the El Salvadorean "Revolutionary Junta of Government" to promulgate such degree under direct threat of political and economic sanctions (including the termination of U.S. economic and military assistance), and who paid for and assisted in the implementation of such decree and the resultant expropriation of Las Lahas.

13. Decree No. 153, and the taking of Las Lahas, was the end result of a decision of the U.S. State Department that it was in the public interest of the United States that a program be implemented that would accomplish a major redistribution of agricultural land ownership in El Salvador by taking such agricultural lands, including Las Lahas, from their lawful owners.

14. In furtherance of this policy the defendants, directly and through United States Government contractors, planned and drafted the expropriation program incorporated in Decree No. 153 and assisted in and paid for its implementation. More specifically,

a. the defendant contracted directly and indirectly with U.S. citizens and organizations (including the American Institute for Free Labor Development and Professor Roy Prosterman of the University of Washington Law School), at a cost of over $1,000,000, for their services in planning, drafting, and implementing the expropriation program;

b. members of the United States Embassy and AID mission in El Salvador, and officials in the State Department in Washington, D.C., devoted substantial time and effort to the planning and implementation of the expropriation program; and

c. the defendant expended more than $20,000,000 in FY 1980 foreign assistance funds to pay for the planning and implementation of the expropriation program and has expended, or has planned for the expenditure of, substantial additional FY 1981 and FY 1982 funds in connection with the expropriation program.

15. Officials and experts in the El Salvadorean Ministry of Agriculture, as well as the other ministries, were largely excluded from the planning of the expropriation program and were not advised of the plans until March 4, 1980, when some 180 such officials were summoned to a meeting at a hotel in El Salvador, where they were held for three days, without being permitted to leave. At such meeting they were briefed on the expropriation program devised by the defendant and its contractors and, despite substantial protests and resignations by such officials, the first phase of the expropriation program (including the expropriation of Las Lahas) was commenced on or about March 7, 1980.

16. In addition to its role in planning and implementing the expropriation program, the defendant directly caused and brought about the adoption and promulgation of Decree No. 153, under which Las Lahas was taken. In the weeks preceding the March 6, 1980, promulgation of Decree No. 153, it became apparent that the El Salvadorean "Revolutionary Junta of Government" was unwilling to adopt and carry out the expropriation program that had been planned, and which was strongly and actively supported and encouraged by the United States. Under these circumstances the defendant, acting primarily through

James Cheek, a senior State Department official who at the time was the acting United States Ambassador to El Salvador, accomplished the adoption and promulgation of Decree No. 153, and the expropriation of Las Lahas, by threatening political retaliation, including the termination of United States economic aid and military assistance to El Salvador, if the Junta did not adopt and carry out the expropriation program. The actions of the El Salvadorean "Revolutionary Junta of Government" which were necessary to effectuate the expropriation were thus taken because of, and as a direct result of, political and economic pressure from the United States and in taking such actions the El Salvadorean Junta acted as an agent of the defendant.

17. The defendant's basic role in planning and carrying out the expropriation program under which Las Lahas was taken is a matter of public record. For example: former United States Ambassador Robert White has described Professor Prosterman, who was working under contract with and for the defendant, as the "father" of the El Salvadorean expropriation program and has stated that he wrote the expropriation law which is embodied in Decree No. 153; former Ambassador James Cheek has acknowledged, in testimony before a Congressional subcommittee, that his success in getting the El Salvadorean Junta to adopt the expropriation program "resulted from the fact that my government [the defendant] had influence behind its policy and that influence could be brought to bear" — by threatening to cut off United States assistance and support; and the millions of dollars in United States aid devoted to paying for the planning and implementation of the expropriation program is a matter of public record in Congressional reports.

DEFENDANT'S ACTIONS SUBSEQUENT TO THE TAKING

18. Since the taking of Las Lahas in March, 1980, the defendant United States has continued its policy of depriving the plaintiffs of their property without just compensation and, indeed, without any compensation. As explained more fully in the following paragraphs, defendant has failed to provide any compensation itself and has also failed and refused to take any action, including action prescribed by federal statute, to assist the plaintiffs in obtaining compensation from the Government of El Salvador.

19. Defendant, and in particular officials of the State Department, have denied any responsibility or obligation to the plaintiffs for the taking of Las Lahas – claiming that the State Department was not aware that Las Lahas was owned by United States citizens. In fact, the defendant did have knowledge of the plaintiffs' ownership interests in Las Lahas and there were a number of specific communications regarding such ownership interests between representatives of the plaintiffs and the United States Embassy in El Salvador well before the March, 1980, expropriation of Las Lahas.

20. In furtherance of a policy to deprive the plaintiffs of their property without compensation, the defendant also has refused to take action prescribed by Act of Congress which would have resulted in a suspension of foreign assistance to the Government of El Salvador, which had acted in concert with the defendant in taking Las Lahas. Section 620(e)(1) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2370(e)(1), provides that the United States shall suspend foreign aid to any government that expropriates property of United States citizens and does not, within a six-month period, take appropriate steps to pro-

vide "speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof." Despite repeated requests by the plaintiffs, and despite defendant's admissions that the plaintiffs' property has been taken without compensation and that no steps have been taken to provide fair compensation, the State Department has refused to make a determination of the statute's applicability and has refused to take action to suspend United States aid to the Government of El Salvador. In refusing to take such action, the defendant has continued its policy of depriving the plaintiffs of their property without just compensation, has acted to protect the interests of the Government of El Salvador, which acted in concert with the defendant in the taking of Las Lahas, and has denied the plaintiffs the benefit of a mechanism provided by the Congress for assuring that fair compensation is paid to United States citizens whose property located in foreign countries is expropriated.

21. In addition, and also in furtherance of its policy to deprive the plaintiffs of property without just compensation, the defendant has refused and failed, despite repeated requests by the plaintiffs, to take any meaningful action to facilitate or assist the plaintiffs' attempts to initiate negotiations with the Government of El Salvador concerning compensation for the expropriation of Las Lahas. Despite repeated requests by the plaintiff, defendant has failed to arrange even a single meeting between the plaintiffs and representatives of the Government of El Salvador to discuss compensation.,

COUNT I
(UNCONSTITUTIONAL TAKING OF PROPERTY)

Plaintiffs bring Count I of this Petition against defendant as follows:

22. Plaintiffs repeat and reallege herein by reference all of the allegations contained in Paragraphs 1 through 21 above.

23. By virtue of its actions described herein, which include planning and drafting the expropriation program which was carried out in El Salvador, causing that expropriation program to be adopted and implemented, assisting in such implementation, and paying for the planning and implementing of such program, the defendant has taken the property of the plaintiffs, namely their ownership interests and rights in Las Lahas, for a public purpose without just compensation, in violation of the plaintiffs' rights as United States citizens under the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully request this Court to award judgment in their favor against the defendant on this Count I in the amount of $20,000,000 or in such amount as may be determined to represent the just value of their property interests in Las Lahas as of March 6, 1980, together with interest thereon at the maximum legal rate, plus the costs, including attorney's fees, expended by the plaintiffs in protesting and seeking relief from the taking of their property, plus the costs, including attorneys' and appraisers' fees, of this action.

COUNT II
(UNCONSTITUTIONAL TAKING OF PROPERTY)

As an alternative to Count I, plaintiffs bring Count II against defendant as follows:

24. Plaintiffs repeat and reallege herein by reference all of the allegations contained in Paragraphs 1 through 21 above.

25. Defendant entered into a joint adventure and conspiracy with the Government of El Salvador to take the plaintiffs' property without just compensation and, in furtherance of such conspiracy, the defendant and the Government of El Salvador acted in concert to plan, adopt and carry out an expropriation program and to expropriate and take plaintiff's property, namely their ownership rights and interests in Las Lahas, for a public purpose without just compensation, in violation of plaintiffs' rights as United States citizens under the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully request this Court to award judgment in their favor against the defendant on this Count II in the amount of $20,000,000 or in such amount as may be determined to represent the just value of their property interests in Las Lahas as of March 6, 1980, together with interest thereon at the maximum legal rate, plus the costs, including attorneys' fees, expended by the plaintiffs in protesting and seeking relief from the taking of their property, plus the costs, including attorneys' and appraisers' fees, of this action.

COUNT III
(UNCONSTITUTIONAL TAKING OF PROPERTY)

As an alternative to Counts I and II, Plaintiffs bring Count III against the defendant as follows:

26. Plaintiffs repeat and reallege herein by reference all of the allegations contained in Paragraphs 1 through 21 above.

27. If it should be determined in this action that the taking of Las Lahas was not for a "public purpose" within the meaning of the Fifth Amendment of the United States Constitution, such taking and the actions of the defendant

deprived the plaintiffs of their property without due process of law, in violation of plaintiffs' rights as United States citizens under the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiffs respectfully request this Court to award judgment in their favor against the defendant on this Count III in the amount of $20,000,000 or in such amount as may be determined to represent the just value of their property interests in Las Lahas as of March 6, 1980, together with interest thereon at the maximum legal rate, plus the costs, including attorneys' fees, expended by the plaintiffs in protesting and seeking relief from the taking of their property, plus the costs, including attorneys' and appraisers' fees, of this action.

COUNT IV
(CLAIM UNDER ACT OF CONGRESS)

Plaintiffs bring Count IV against the defendant as follows:

28. Plaintiffs repeat and reallege herein by reference all of the allegations contained in Paragraphs 1 through 21 and in Paragraph 25 above.

29. In furtherance of the conspiracy and joint venture between the defendant and the Government of El Salvador to take the plaintiffs' property without just compensation, the defendant failed and refused to invoke the sanctions prescribed by Section 620(e)(1) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2370(e)(1), which would require the termination of United States foreign aid to the deendant's co-conspirator, the Government of El Salvador, because of the latter's failure to provide fair and prompt compensation for the taking of plaintiffs' property. Such failure and refusal constituted a violation by

defendant of 22 U.S.C. §2370(e)(1), to the specific detriment of the plaintiffs, for which the defendant is liable in damages to the plaintiffs.

WHEREFORE, Plaintiffs respectfully request this Court to award judgment in their favor against the defendant on this Count IV in the amount of $20,000,000 or in such amount as may be determined to represent the fair value of their property interests in Las Lahas as of March 6, 1980, together with interest thereon at the maximum legal rate, plus the costs, including attorneys' fees, expended by the plaintiffs in protesting and seeking relief from the taking of their property, plus the costs, including attorneys' and appraisers' fees, of this action.

COUNT V
(UNCONSTITUTIONAL TAKING OF PROPERTY)

Plaintiffs bring Count V against the defendant as follows:

30. Plaintiffs repeat and reallege herein by reference all of the allegations contained in Paragraphs 1 through 21 above.

31. In addition to its actions in taking the property of the plaintiffs without just compensation, the defendant, by its actions, has effectively extinguished and barred the plaintiffs' right to rely upon principles of international law to obtain compensation from the Government of El Salvador in judicial proceedings for the taking of Las Lahas without fair compensation. More specifically:

a. Under principles of international law a government may not take property of foreign nationals without providing fair and prompt compensation.

b. United States citizens whose property is taken

without fair compensation by a foreign government have the right to rely on such principles of international law in judicial proceedings brought to obtain compensation from the foreign government for such taking of property.

c. The defendant's actions in this case have given the Government of El Salvador the defense, in any judicial proceedings which could be brought by the plaintiffs, that the taking of Las Lahas did not violate principles of international law because such taking was approved, sanctioned, participated in, and in fact brought about by the plaintiffs' own government.

The defendant, therefore, has effectively extinguished plaintiffs' rights to obtain judicial relief against the Government of El Salvador under principles of international law and such action constitutes a taking of plaintiffs' property without just compensation, in violation of plaintiffs' rights as United States citizens under the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully request this Court to award judgment in their favor against the defendant on this Count V in the amount of $20,000,000 or in such amount as may be determined to represent the just value of their property interests in Las Lahas as of March 6, 1980, together with interest thereon at the maximum legal rate, plus the costs, including attorneys' fees, expended by the plaintiffs in protesting and seeking relief from the taking of their property, plus the costs, including attorneys' and appraisers' fees, of this action.

PRAYER FOR RELIEF

32. The plaintiffs respectfully request this Court to enter judgment as follows:

a. Awarding the plaintiffs a money judgment against the defendant in the amount of $20,000,000.00 or in such amount as may be determined to represent the just value of their property interests in Las Lahas as of March 6, 1980, together with interest thereon at the maximum legal rate, plus the costs, including attorneys' fees, expended by the plaintiffs in protesting and seeking relief from the taking of their property, plus the costs, including attorneys' fees and appraisers' fees, of this action.

b. Granting the plaintiffs such other and further relief as the Court deems necessary and proper.

Respectfully submitted,

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JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1912

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRED E. LANGENEGGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable under the Just Compensation Clause of the Fifth Amendment for the expropriation of a coffee plantation in El Salvador by the Government of El Salvador as part of a large-scale agrarian reform plan adopted in 1980.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 756 F.2d 1565. The opinion of the United States Claims Court (Pet. App. 18a-32a) is reported at 5 Cl. Ct. 229.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a) was entered on March 12, 1985. The petition for a writ of certiorari was filed on June 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the United States must pay compensation to them for the value of their interests in a coffee plantation located in El Salvador that was expropriated by the Government of El Salvador as part of an agrarian reform program adopted in 1980. The United

States Claims Court granted summary judgment for the United States (Pet. App. 18a-32a), and the court of appeals affirmed (*id.* at 1a-17a).

1. Petitioners are six United States citizens, each of whom claims an undivided one-tenth interest in a large coffee plantation of approximately 4,500 acres (1,822.5 hectares) located in El Salvador and known as Las Lahas. Petitioners derive their ownership through inheritance from Blanca Rosa Langenegger, a Salvadoran national who died in 1978. Pet. App. 2a, 18a, 35a-36a.

During the 1970s, El Salvador experienced increasing political instability and violence. On October 15, 1979, a group of Salvadoran military officers staged a coup d'etat and established a Revolutionary Junta comprised of both civilian and military officials. The new government promised a program of economic, social, and political change, including reform in the areas of agriculture, banking, foreign commerce, labor, and human rights. The United States continued diplomatic relations with the Revolutionary Junta as the sovereign Government of El Salvador and announced its support for the reform program. Pet. App. 2a-3a, 19a, 27a.

On December 7, 1979, as a first step toward agrarian reform, the Government of El Salvador promulgated Decree No. 43, which prohibited the transfer of agricultural lands in excess of 100 hectares (Pet. App. 2a-3a, 19a). During the following months, the new Government of El Salvador made little progress in reform, and violence and urban demonstrations escalated. In the United States, there was increasing concern that the Government of El Salvador was in danger of collapse and might suffer a Marxist takeover. The United States strongly supported enactment of reform measures in El Salvador in order to bring about political stability, and the United States offered economic

and military assistance to the Salvadoran Government. Pet. App. 3a, 19a.

On March 6, 1980, the Government of El Salvador promulgated Decree No. 153, the Basic Law of Agrarian Reform, which established a three-phase program.[1] Phase I, at issue here, provided for expropriation of all agricultural estates in excess of 500 hectares (1,235 acres) and conversion of such estates into cooperatives run by agricultural laborers.[2] In Phase I, which was largely completed by the end of July 1980, the Government of El Salvador expropriated the largest agricultural landholdings in the country: 328 estates containing 12% of all cropland. Decree No. 153 provided that owners of estates taken under Phase I would be compensated by the issuance of agrarian reform bonds, a common form of compensation in land reform programs. Pet. App. 3a, 19a; Prosterman Aff. paras. 9, 10, 24 & Exh. A; Def. App. 18, 22-24.

On March 7, 1980, the Government of El Salvador took possession of Las Lahas pursuant to Phase I of the agrarian reform program. Petitioners concede that the seizure was accomplished by personnel of the Salvadoran military or police, acting pursuant to Decree No. 153. At that time, record title to Las Lahas was in the name of Blanca Rosa Langenegger, a Salvadoran national.[3] Petitioners have not alleged that the United States took possession of or received

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[1]Shortly thereafter, the Government of El Salvador also adopted banking and foreign commerce reforms. Cheek Aff. para. 5; Def. App. 10.

[2]Phase II of the agrarian reform contemplates expropriation of medium-sized estates of between 247 and 1,235 acres. Phase III, known as "land-to-the-tillers," provides for transfer of ownership of land farmed by tenants or sharecroppers to the person farming the land. Prosterman Aff. para. 8; Def. App. 17-18.

[3]Plaintiffs' Answer to Defendant's Interrogatory No. 5, at 28; Def. App. 28.

a direct interest in the property, and they admit that it was used exclusively by the beneficiaries of the Salvadoran agrarian reform program. Pet. App. 22a, 38a. Petitioners also have not disputed that they have not applied to the Government of El Salvador for compensation for their land.[4]

2. Petitioners filed this action on February 26, 1981 to recover the value of their interests in Las Lahas. They contended that the expropriation of Las Lahas constituted a taking of their property by the United States without just compensation, in violation of the Fifth Amendment (Pet. App. 43a-45a).[5] Petitioners alleged that Las Lahas was taken "as a direct and effective result of the actions and

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[4]See Defendant's Proposed Findings of Uncontroverted Fact and Proposed Conclusions of Law para. 9; Appellee's Br. 2 n.2, 29.

[5]Petitioners also alleged that the taking of Las Lahas was not for a "public purpose" within the meaning of the Just Compensation Clause of the Fifth Amendment and that it therefore deprived them of their property in violation of the Due Process Clause (Pet. App. 45a-46a); that the United States violated 22 U.S.C. 2370(e)(1) by failing to terminate foreign assistance to the Government of El Salvador because of the latter's alleged failure to pay compensation (Pet. App. 46a-47a); and that the United States had effectively extinguished petitioners' claim against El Salvador under international law (*id.* at 47a-48a). The Claims Court rejected the first two of these additional claims on the ground that neither the Due Process Clause nor 22 U.S.C. 2370(e)(1) mandates the payment of compensation for a violation and that neither therefore can give rise to an award of money damages under the Tucker Act (Pet. App. 31a). Petitioners did not appeal those rulings by the Claims Court, and they are not at issue here.

The Claims Court also granted summary judgment in favor of the United States on petitioners' claim that the United States had extinguished their claim against El Salvador under international law (Pet. App. 30a-31a). However, the court of appeals directed that this claim be dismissed without prejudice, concluding that an international forum is available for determination of petitioners' claim against El Salvador (*id.* at 15a-17a). Petitioners have not sought review in this Court of that aspect of the judgment below.

directives" of the United States (*id.* at 35a); that the United States "was directly responsible for the preparation, adoption, and implementation of Decree No. 153" (*id.* at 38a); and that the United States "drafted and paid for the preparation of Decree No. 153," "persuaded and pressured [the Government of El Salvador] to promulgate such decree under direct threat of political and economic sanctions (including the termination of U.S. economic and military assistance)," and "paid for and assisted in the implementation of [Decree No. 153] and the resultant expropriation of Las Lahas" (*id.* at 39a).

The Claims Court granted the United States' motion for summary judgment (Pet. App. 18a-32a).[6] In the Claims Court's view, the United States may be held liable for a taking by a foreign government only if authorized agents of the United States participated in the foreign government's action and the United States derived a direct benefit from that action (*id.* at 21a-22a). The court concluded that that standard had not been met in this case (*id.* at 22a). It found that the seizure of Las Lahas was carried out by the Government of El Salvador pursuant to an official decree of that Government, and that the property was used exclusively by El Salvador. By contrast, the court observed, there is no allegation that the United States received any direct interest in the land. The court further explained that even if it were persuaded that the United States received certain collateral benefits from the Salvadoran land reform program, in the form of increased stability in the country and

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[6]The United States moved for summary judgment on the basis of sworn affidavits and answers to interrogatories. Pursuant to a pretrial order entered by the Claims Court, the United States filed a detailed statement of proposed uncontroverted facts, to which petitioners responded. The pretrial order "deem[ed] the material facts claimed and adequately supported by the moving party to be established except to the extent that such material facts * * * are controverted by affidavit or other written or oral evidence." See also Cl. Ct. R. 56(e).

the region, "those benefits are so remote as not to support a taking claim" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-17a). It agreed with the Claims Court that, under applicable precedent, a court in a case such as this must consider both the nature of the United States' activity and the benefit the United States has derived from the action occurring on foreign soil (*id.* at 10a-13a). In particular, the court reasoned that "[w]here the actual expropriation is by the hand of a foreign sovereign, the United States cannot be held responsible merely because its activity is that of 'friendly' persuasion regarding general policy, common among allies, or when the sole benefit to the United States is the political stability of its neighbors" (*id.* at 13a). Applying these principles to the circumstances of this case, the court concluded that the alleged benefit to the United States of hemispheric stability was only "incidental" to the expropriation, and "[t]he expropriation by the foreign sovereign's legislation was for the benefit of that country's national interest as perceived by [its] national leaders, and was not for the United States' public benefit" (*id.* at 14a).[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, petitioners' contention,

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[7]The court of appeals reversed the Claims Court's holding (Pet. App. 24a-29a) that petitioners' taking claim raised non-justiciable political questions. See *id.* at 4a-9a. The Claims Court had determined that there are no judicially discoverable and manageable standards by which to determine what influence the United States actually had on the Revolutionary Junta's decision to enact agrarian reform and that to attempt to resolve this issue would intrude the court into an area of foreign affairs committed to the political branches (*id.* at 24a-29a). The court of appeals, however, concluded that this suit involves only a land-taking claim, a subject traditionally resolved by the courts, and presents no occasion for second-guessing of foreign relations decisions by the Executive (*id.* at 7a-9a).

which they concede is "novel" and "has not previously been addressed directly by any federal court" (Pet. 9), does not warrant review by this Court.

1. The property in which petitioners claimed an interest is located in El Salvador. It was expropriated by officials of the Government of El Salvador, acting pursuant to a legislative decree of that Government. As the court of appeals held, and as petitioners do not dispute, the expropriation "was for the benefit of that country's national interest as perceived by the national leaders" (Pet. App. 14a). Petitioners do not question that El Salvador is an independent sovereign nation, recognized as such by the United States, and they accept that the expropriation was valid under Salvadoran law. See Pet. 6; Pet. App. 6a-7a. In these circumstances, the court of appeals was clearly correct in concluding that the taking of their property was by El Salvador, not by the United States.

a. As petitioners concede (Pet. 12), "[e]xcept where the United States is engaged in military operations in a foreign country, or acting as an occupying government, the United States normally has no jurisdiction or power to act directly against property in a foreign country." Instead, the power to expropriate or otherwise act directly against such property resides in the government of that country. There is no suggestion here that the United States possessed or exercised jurisdiction or power to expropriate the property in question in connection with military operations or as an occupying government in El Salvador. To the contrary, as we have said, petitioners do not question the independent sovereignty of El Salvador or the validity of the expropriation as part of that nation's program of agrarian reform. Thus, petitioners' argument founders at the outset by their failure to identify by what jurisdiction or power the United States may be said to have "taken" the property in El Salvador.

What is more, petitioners do not even premise their claim on the assertion that the United States in fact did seize the property. Compare *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149, 152 (1952) (no taking of plaintiff's facilities in the Philippines for a 14-day period during World War II, because there was no "assumption of actual physical or proprietary dominion over [the property] during this period"),[8] with *Seery* v. *United States*, 127 F. Supp. 601 (Ct. Cl. 1955) (United States must pay just compensation for property, owned by a United States citizen and situated in Austria, that was physically acquired by the Army for use as an officer's club). Their argument is that even though the United States did not actually expropriate the land, it should be deemed responsible for El Salvador's action in doing so (and should compensate petitioners for the full value of their interests in the property), because the United States allegedly engaged in diplomatic persuasion and offered financial inducements to encourage El Salvador to carry out the land reform program. It is not surprising that petitioners have offered no support for such an unprecedented result.

The Government of El Salvador is not a mere agent of the United States, such that its expropriation of land in El Salvador must be deemed the action of —and be attributed to — the United States. It is recognized by the Executive as the presiding sovereign within the territorial boundaries of the country, and that recognition is conclusive upon the courts. See *United States* v. *Belmont*, 301 U.S. 324, 328 (1937); *United States* v. *Pink*, 315 U.S. 203, 229 (1942).

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[8] In *Caltex*, the United States Army subsequently ordered destruction of the property to prevent its falling into the hands of the advancing Japanese troops. The Court held that the United States was not required to pay compensation even as of that time, because the "losses must be attributed solely to the fortunes of war, and not to the sovereign." 344 U.S. at 155-156 (footnote omitted).

Even if it is assumed that petitioners are correct in their allegations that the United States, through the Executive, engaged in diplomatic persuasion and offered substantial assistance to induce El Salvador to carry our the agrarian reform program, those circumstances would not make that program any less the sovereign act of the Government of El Salvador. The essential fact would remain that the responsible leaders of El Salvador determined that the agrarian reform program was in the national interest of that country.

Just as we must presume that the States within our federal system are capable of exercising independent judgment, even when motivated by economic inducements offered by the federal government (see, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589, 590 (1937); *United States* v. *Bekins*, 304 U.S. 27, 51-52 (1938)), so too the courts of this Nation must presume in the instant case that the responsible leaders of El Salvador were capable of and did exercise independent sovereign power in promulgating the reform measures, even if induced by the United States to do so. The act of state doctrine and related principles of nonjusticiability will not permit a court of the United States to question the bona fides of a foreign government when it purports to implement such a measure under its own authority. See, *e.g.*, *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 686, 691 nn.7-8 (1976); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Accordingly, the courts below properly declined petitioner's invitation to look behind the expropriation carried out by the Government of El Salvador in order to find it to be an act of the United States.[9] See *Ramirez de Arellano* v. *Weinberger*,

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[9]In this respect, the act of state doctrine is related to principles of nonjusticiability under the political question doctrine. We therefore disagree with the court of appeals' holding (Pet. App. 4a-11a) that this dispute is justiciable. However, because the court of appeals correctly rejected petitioners' claim on the merits, the justiciability issues present no occasion for review by this Court.

745 F.2d 1500, 1572 (D.C. Cir. 1984) (en banc) (Starr, J., dissenting), vacated and remanded, No. 84-1398 (May 20, 1985).[10]

b. Petitioners contend (Pet. 18-20), however, that the decision below conflicts with the decisions of the Court of Claims in *Turney* v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953), and *Porter* v. *United States*, 496 F.2d 583 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975), which, in petitioners' view, established the proposition that "diplomatic pressure" can furnish the basis for finding the United States liable for a taking by a foreign government. This contention is without merit.

In *Turney*, the Government of the Philippines, at the request of the United States, embargoed the export of the plaintiff's property (classified military radar), thereby forcing the plaintiff to retain it at a military base, where it subsequently was "repossessed" by the United States. 115 F. Supp. at 463. The court found a taking by the United States, but held that "the taking occurred on October 13, 1947, when the Army officially took possession of the property," not on the date of the embargo imposed by the Philippines

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[10]Judge Starr's observations in *Ramirez* with respect to the judicial challenge to the United States' lending of assistance to the Regional Military Training Center (RMTC) in Honduras are relevant here as well (745 F.2d at 1572):

> Assuming that the majority does not wish to suggest that the United States simply invaded Honduras, its invitation to the parties to plumb the timing of and relative responsibilities for the establishment of the RMTC is a flagrant affront to the sovereignty of Honduras. Attempts by the parties to find "facts" with respect to these "issues" would in effect, question Honduran autonomy and raise the specter of a United States court declaring the government of an allied nation so subject to U.S. "manipulation" as to be incapable of independent sovereign acts worthy of deference under the act of state doctrine.

(July 30, 1947). *Id.* at 464.[11] *Turney* accordingly stands only for the unremarkable proposition that actual physical appropriation by the United States of property located abroad can be a taking by the United States. There was no such appropriation of the property by the United States in this case.

In *Porter*, the Court of Claims reaffirmed that a "key element" of the cases applying the Fifth Amendment to the taking of property located outside the United States "is that each concerned an alleged taking *by the United States*, regardless of where the property was located." 496 F.2d at 591 (emphasis in original). In *Porter* itself, the court held that the United States was not liable for an alleged taking based on acts of officials of the Trust Territory of the Pacific Islands, because those officials lacked authority to act on behalf of the United States. 496 F.2d at 591-592. This key element of a taking by the United States likewise is lacking here. The officials of the Government of El Salvador who implemented the expropriation decree, like the officials of the Trust Territory in *Porter*, did not purport to act on behalf of the United States and did not have the authority to do so. See also *Edison Sault Electric Co.* v. *United States*, 552 F.2d 326, 333 (Ct. Cl. 1977), discussing *Anglo-American Trading Corp.* v. *United States*, 109 Ct. Cl. 859 (1948) (United States not liable for trade embargo allegedly "induced" by the United States; "the Government does not become a principal to an action by suggesting that action to a third party, so long as the third party is free to reject the Government's suggestion").

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[11]Subsequent decisions of the Court of Claims confirm that it was the actual repossession by the United States that constituted the taking by the United States in *Turney*. See *Miller* v. *United States*, 140 F. Supp. 789, 795 (Ct. Cl. 1956); *Finks* v. *United States*, 395 F.2d 999, 1004 (Ct. Cl. 1968).

The principle of *Porter* is not limited to actions by a foreign sovereign — although the absence of an agency relationship as a matter of law is especially evident in that setting. As petitioners concede (Pet. 20 n.8), the United States likewise has been held not to be liable on a taking theory for actions undertaken by state and local governments at the request of federal officials or pursuant to federal standards (see, *e.g., D.R. Smalley & Sons, Inc.* v. *United States*, 372 F.2d 505, 507-508 (Ct. Cl. 1967); *NBH Land Co.* v. *United States*, 576 F.2d 317 (Ct. Cl. 1978); *De-Tom Enterprises, Inc.* v. *United States*, 552 F.2d 337 (Ct. Cl. 1977); *C.S. Lenoir Co.* v. *United States*, 618 F.2d 125 (Ct. Cl. 1979) (Table); *Custom Contemporary Homes, Inc.* v. *United States*, 5 Cl. Ct. 88, 90-92 (1984)), just as the United States is not liable on a contract theory for the actions of those governments (*Chas. H. Tompkins Co.* v. *United States*, 230 Ct. Cl. 754, 758-759 (1982); *G-Lam Corp.* v. *United States*, 227 Ct. Cl. 764 (1981); *Housing Corp. of America* v. *United States*, 468 F.2d 922 (Ct. Cl. 1972); *H.A. Ekelin & Associates* v. *United States*, 225 Ct. Cl. 561, 563 (1980); *Willis* v. *United States*, 224 Ct. Cl. 628, 630 (1980)).

The premise of the cases just cited is that the federal government and the state or local government that receives the federal aid under federal restrictions may structure their relationship in such a way that the acquisition of property, formation of contracts, and other measures taken in the implementation of the project are the responsibility of the state or local government. The decision to accept the aid is an independent act of the latter government, and it and the people it represents receive the direct public benefit from the project. The receipt of federal aid and the presence of federal restrictions do not render the state or local government an agent of the federal government and do not render the federal government liable for the actions of the state or

local government, including any acquisition of property necessary to carry out the project. Cf. *United States* v. *Orleans*, 425 U.S. 807 (1976). This is so even though the federal government and the Nation as a whole presumably realize some indirect or incidental benefit from the state or local project — *e.g.*, the construction of a federally assisted highway. If the result were otherwise, any person whose property was taken for a federally assisted program could elect to bring an action against the United States for just compensation under the Tucker Act, instead of seeking compensation from the state or local government that actually carried out the program.

Similar principles apply where the project involved is undertaken by a foreign government. The fact that the foreign government has received assistance from the United States or has been persuaded by the United States to embark on the project does not render the project an undertaking of the United States. The United States realizes no independent or direct benefit in those circumstances. Any benefit the United States realizes instead is incidental to and entirely derivative of those realized by the foreign government and its people — *e.g.*, the particular project may result in domestic tranquility in the foreign country, which in turn may lead to international stability and friendship and thereby to the furthering of the interests of the United States.

2. Petitioners also argue (Pet. 16-18) that the United States should be responsible for the payment of just compensation on the related theory that the agrarian reform program was in effect a "joint venture" of the Government of the United States and the Government of El Salvador. This notion, too, is an affront to the sovereignty of El Salvador, and petitioners cite no authority for requiring the United States to pay compensation in such circumstances. In fact the United States has uniformly been held *not* to be liable where the alleged taking was not by the United States,

even though it was the product of action that was formally carried out as a joint undertaking by the United States and other nations, or the United States or one of its officers formally approved action that was actually implemented by the foreign government. See, *e.g., Anglo Chinese Shipping Co.* v. *United States*, 127 F.Supp. 553 (Ct. Cl.), cert. denied, 349 U.S. 938 (1955) (United States not liable for taking effected by Japanese Government at the direction of the Allied Powers in occupied Japan, even though the United States was one of the Allied Powers)[12]; *Standard-Vacuum Oil Co.* v. *United States*, 153 F. Supp. 465 (Ct. Cl.), cert. denied, 355 U.S. 893 (1957) (same); see also *Best* v. *United States*, 292 F.2d 274 (Ct. Cl. 1961); *Huther* v. *United States*, 145 F. Supp. 916 (Ct. Cl. 1956); *Edison Sault Electric Co.* v. *United States, supra; Soucheray* v. *Corps of Engineers,* 483 F. Supp. 352, 355 (W.D. Wis. 1979).

In making their joint venture argument, petitioners principally rely (Pet. 16-17) not on cases arising under the Just Compensation Clause of the Fifth Amendment, but on cases arising under the Fourth Amendment, in which a constitutional violation has been found by virtue of the participation by federal officials in a search by officers of other governments who were not bound by Fourth Amendment standards. See, *e.g., Byars* v. *United States*, 273 U.S. 28 (1927). Those cases, however, involved participation by federal officials in conduct that itself violated constitutional standards. By contrast, the taking of property, standing alone, does not violate the Constitution. The Fifth Amendment prohibits only the taking of property by the United States without just compensation. And even when the property has been taken by the United States, the Constitution does not require the payment of compensation in advance of or contemporaneously with the taking, if a

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[12]Compare *Hirota* v. *MacArthur*, 338 U.S. 197, 198 (1949).

method is available for obtaining compensation at a later date. See, *e.g.*, *Williamson County Regional Planning Commission* v. *Hamilton Bank*, No. 84-4 (June 28, 1985), slip op. 20-21. These considerations fatally undermine petitioners' reliance on Fourth Amendment cases.

As explained above (see page 4, *supra*), there is no indication that petitioners have sought compensation from El Salvador pursuant to the land reform decree. In addition, El Salvador is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, 17 U.S.T. 1270, which establishes a forum for binding arbitration of such claims. In order to qualify for benefits under the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, Tit. II, 97 Stat. 384 *et seq.*, the Government of El Salvador provided written assurance that it will submit such claims to binding international arbitration pursuant to the rules of the Convention. The court of appeals in this case held that this international forum remains available and that petitioners' claim against El Salvador under international law therefore has not been extinguished (Pet. App. 16a), and petitioners have not sought review of that holding. Until petitioners have exhausted such remedies against El Salvador, it cannot be said that the expropriation of Las Lahas was accomplished without compensation even insofar as the involvement by the Government of El Salvador is concerned. Compare *Williamson County*, slip op. 20-23.

Moreover, a failure by El Salvador to make compensation clearly could not in any event be attributed to the United States and give rise to recovery under the Tucker Act for a taking by the United States without just compensation. Even if petitioners are correct that the United States encouraged and lent assistance to the land reform program — and thereby to the taking of Las Lahas — the United States cannot be held liable in this case on the theory that it

encouraged that any taking of the property of a United States citizen under that program be without compensation. Yet absent such involvement in the denial of compensation, there could be no basis for recovery from the United States. See *Williamson County Regional Planning Commission* v. *Hamilton Bank, supra.* As petitioners concede (Pet. 14), it is the firm position of the United States, embodied in statutes enacted by Congress, that foreign governments must pay compensation when property of United States' nationals is taken. That position is reflected in the provision of the Caribbean Basin Economic Recovery Act just discussed and in 22 U.S.C. 2370(e), which requires the President to suspend assistance to the government of any country if it fails to discharge its obligation under international law to provide such compensation. Petitioners' remedies therefore lie against the Government of El Salvador under its own laws or under international law. In appropriate circumstances, the Executive also may espouse the claims of United States' nationals against a foreign government and may terminate aid or resort to other diplomatic measures. But in no event does a cause of action lie against the United States for the conduct of a foreign government.[13] That result would have the undesirable consequence of excusing foreign governments from living up to their obligations to United States citizens and excusing

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[13]Petitioners also cite (Pet. 15-16, 18, 22) *YMCA* v. *United States*, 395 U.S. 85 (1969), but that decision has no relevance here. The plaintiffs in *YMCA* sought just compensation for damage done by rioters to buildings owned by the plaintiff and occupied by United States troops during riots in Panama. This Court found that no compensation was due because the Army troops were attempting to defend the plaintiff's buildings. The Court stated that "in any case where government action is causally related to private misconduct which leads to property damage * * * a determination must be made whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment." 395 U.S. at 93. Thus, *YMCA* concerns governmental liability for damage

United States citizens from pressing their claims against those governments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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caused by *private* conduct, not the liability of the United States for the exercise of the power of eminent domain by another sovereign.

Petitioners' reliance (Pet. 21) on *Hawaii Housing Authority* v. *Midkiff*, No. 83-141 (May 30, 1984), is likewise misplaced. The Court held in *Midkiff* that a land reform program enacted by the Hawaii legislature satisfied the "public use" requirement of the Fifth Amendment. There is no doubt that the program effectively constituted an exercise of the power of eminent domain by the State of Hawaii. Similarly, the agrarian reform program in El Salvador was an exercise of the power of eminent domain by the Government of El Salvador. Nothing in *Midkiff* suggests that liability for just compensation attaches to anyone other than the sovereign that accomplished the taking.